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**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1946



LOUIS DABNEY SMITH, *Petitioner*

*v.*

UNITED STATES OF AMERICA

*Respondent*



**Petition for Writ of Certiorari  
to the United States Circuit Court of Appeals  
for the Fourth Circuit**

↓  
HAYDEN C. COVINGTON ↓

↓  
CURRAN E. COOLEY

↓  
GROVER C. POWELL

*Counsel for Petitioner*

APPENDIX

1. The first part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

2. The second part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

3. The third part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

4. The fourth part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

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8. The eighth part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

9. The ninth part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

10. The tenth part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

11. The eleventh part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

12. The twelfth part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

13. The thirteenth part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

14. The fourteenth part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

15. The fifteenth part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

16. The sixteenth part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

17. The seventeenth part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800.

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THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

RESEARCH REPORT

NO. 1

1950

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2. The second part describes the experimental methods used in the study.

3. The third part presents the results of the experiments.

4. The fourth part discusses the significance of the findings.

5. The fifth part contains conclusions and suggestions for further work.

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

◆  
LOUIS DABNEY SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA  
*Respondent*  
◆

## **Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit**

TO THE SUPREME COURT OF THE UNITED STATES:

Louis Dabney Smith petitions this court for a writ of certiorari. He shows unto the court as follows:

### **Summary of Matters Involved**

#### **1. *Preliminary statement.***

The judgment of the court below is not a final order. The court below affirmed that part of the judgment of the trial court refusing to grant the motion for judgment of acquittal dismissing the indictment, but reversed the case for prejudicial error committed by the trial court.

Petitioner requests this Court to grant the certiorari to determine whether or not the controversy should be ended now by a dismissal of the indictment. Extraordinary and exceptional circumstances of the case warrant the granting of certiorari, although the judgment of the trial court was reversed by the court below and the cause remanded for a new trial. See *Jurisdiction of the Supreme Court of the United States*, Robertson and Kirkham, pp. 623-628;

*Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403; *Forsyth v. Hammond*, 166 U. S. 506; *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, 418.

## 2. *Opinion of court below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter, but appears in the record. [340-353]\*

## 3. *Jurisdiction.*

The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court on May 7, 1934.

## 4. *Timeliness of this petition.*

The judgment was rendered and entered on July 29, 1946. [353-354] Petitioner applied for an extension of time in which to file the petition for certiorari. The Chief Justice of the United States granted the application. The time within which to file the petition was extended to and including September 27, 1946. [357] The petition is filed within the extended time.

## 5. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 601.5, 603.59, 615.81, 615.82, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 626.2, 626.3, 627.13, 629.1-629.35, 633.2, 633.21, 642.41, and 642.42 of the Selective Service Regulations (32 C. F. R. Supp. 601.5 *et seq.*) promulgated by the President under said Act.

\* Bracketed figures appearing in this petition and the supporting brief refer to pages of printed transcript of the record.

#### 6. *Questions Presented.*

1. Did the court below err in failing to order the indictment dismissed because the undisputed evidence, fully developed, showed that the local board, which issued the order supporting the indictment, failed to make a record of oral evidence given at a personal appearance as required by the Selective Service Regulations, thereby depriving petitioner of a full and fair hearing before the board of appeal, contrary to the due process clause?

2. Did the court below err in holding that whether the petitioner actually gave additional facts which were not included in the record was a question of fact for the jury to decide, when the undisputed evidence conclusively showed that additional testimony was given which the local board considered and admittedly did not reduce to writing as required by the Regulations?

3. Is the interest of petitioner in the outcome of the trial sufficient to present an issue of fact as to his uncontradicted testimony about evidence given to the local board which admittedly was not reduced to writing, especially when his testimony is unimpeached and corroborated by draft board records?

4. Did the court below err in failing to order the indictment dismissed because the undisputed evidence showed that the local board refused to reopen petitioner's case upon tender of written evidence covering the facts that the local board had previously failed to reduce to writing and forward to the board of appeal, contrary to the Regulations?

5. Did the court below err in failing to order the indictment dismissed because the undisputed evidence showed that the order to report for induction was void because issued and signed by the clerk rather than by a member of the local board, contrary to the Regulations?

6. Did the court below err in failing to order the indictment dismissed because the undisputed evidence showed

that the administrative agency, at the time of the final classification, arbitrarily and capriciously denied petitioner his claim for exemption as a minister and classified him as liable for training and service without basis of fact?

7. Did the court below err in failing to hold that the trial court should have granted petitioner's motion for judgment of acquittal presented at the close of all the evidence, because the undisputed fully-developed evidence showed that the order supporting the indictment was void?

### **Statement of Case**

#### **FORM AND HISTORY OF ACTION**

This criminal action was begun by indictment returned against Louis Dabney Smith charging him with violation of the Selective Training and Service Act of 1940, as amended. [2] The indictment charged that he unlawfully and knowingly refused and failed to submit to induction, after reporting for induction, upon final physical examination. [2] Petitioner pleaded not guilty. [3] Trial to a jury began March 25, 1946. [3] At the close of all the evidence a motion for judgment of acquittal was made. [188-192] On denial thereof exception was taken. [193] At the close of all the evidence, requested charges were submitted to the court. [193-195, 247-289] Before argument of counsel, the trial court indicated which requested charges would be given and which refused. [193-195] After counsel's summation to the jury, [195-238] the court charged the jury, [238-290, 299] indicating what portion of his charge was petitioner's requested instructions. [246-247] Petitioner objected and excepted to the court's charge, and over the refusal to give certain of the requested charges. [291-299] The jury returned a verdict of guilty on March 27, 1946. [1, 300] Immediately following the verdict, petitioner was sentenced to serve 3½ years in the custody of the Attorney General. [1, 305] On March 27, 1946, petitioner

filed his written notice of appeal. [305] He was admitted bail on grounds that substantial questions were involved which should be decided, [305] and which support each ground of this petition for writ of certiorari.

### FACTS

Louis Dabney Smith registered with Local Board No. 68, Columbia, South Carolina, under the Selective Training and Service Act on December 24, 1942. [5, 118] He was mailed a questionnaire on January 21, 1943. [6, 118] It was filled out and returned to the local board on January 29, 1943. [6, 118] In the questionnaire, he stated: " 'Education'—I have completed 8 years of elementary school and 3 years of high school. I have had the following schooling: University of South Carolina, course of study, engineering, length of time attended, one and one-half years; home study course for the ministry, 4 years. . . . 'Present Occupation or Activity'—I am majoring in engineering preparing for B. S. Degree at University of South Carolina. . . . I do intend to take an examination for license in engineering. . . . 'Occupational Experience, Qualifications, and Preferences'—occupation, ministry, kind of work done, as shown at Acts 20:20 and Luke 8:1 in the Bible; years worked, 1938 to date. My usual occupation, or the occupation for which I am best fitted, is ministry; . . . I prefer the following kind of work: ministry. . . . 'Minister, or Student Preparing for the Ministry', I am a minister of religion. I do customarily serve as a minister. I have been a minister of the Jehovah's Witnesses since Sept. 1938. I have been formally ordained, scripturally ordained as shown by Luke 20:1, 2 and John 16:14, Isa. 61:1, on Sept. 1938. . . . ¶ In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class 4D."\* [6-7, 118] Petitioner thereupon filed, on Feb-

\* Classification of minister of religion under Sec. 622.44 of Regulations.

ruary 8, 1943, Special Form for Conscientious Objector, Form 47, for the purpose of elucidating on his training for the ministry and his claim for exemption as a minister of religion. [20, 119-122] In this special form he stated, among other things: "I acquired my belief from the Bible, which is God's Word and which I have studied in well organized classes for four years under the direction of the Watchtower Bible & Tract Society of Brooklyn, New York. . . . I have devoted on the average of 20 hours per week for the last four years studying and preaching the gospel of God's kingdom as set forth in 2 Timothy 2:15, Acts 20:20 and Matthew 24:14." [120] The special form further showed: "Types of Work, Ministry,' and from 1938 to date. . . . (a) State the name of the sect, and the name and location of its governing body or head if known to you: Jehovah's Witnesses. Watchtower Bible & Tract Society, Brooklyn, N. Y. (b) When, where, and how did you become a member of said sect or organization? In nineteen hundred thirty-eight at Columbia, S. C. by studying literature of Jehovah's witnesses with the Bible." [121]

Along with this evidence, he filed a petition and affidavit signed and sworn to by twenty-nine persons which stated: "To Whom it May Concern: We the undersigned have known Louis Dabney Smith from two to five years and know him to be a duly ordained minister as set forth in the scriptures, and that during our acquaintance with him he has been actively engaged as a minister and is serving in the capacity of advertising servant for the Columbia, S. C. Company of Jehovah's Witnesses. [122, 124]

Additionally he filed another like petition and affidavit signed and sworn to by forty-three persons which stated: "This is to certify that we the undersigned have known Louis Dabney Smith from two to four years and know that he is a duly authorized representative of the company of Jehovah's Witnesses to preach the gospel of God's kingdom

and is duly anointed by Jehovah God as such as set out in Isa. 61:1, 2, 1 John 2:27 and other scriptures of the Bible, and, as such, he is actively engaged as a regular minister of the gospel under the Watchtower Bible and Tract Society of 117 Adams St., Brooklyn, N. Y." [122, 124-125]

Supporting this evidence there was a certificate of ordination duly issued by the Watchtower Bible & Tract Society, certifying that Louis Dabney Smith was a duly ordained minister, preaching the gospel of God's kingdom regularly as one of Jehovah's witnesses in obedience to the commandments of Almighty God and under the direction of the Watchtower Bible and Tract Society. [122-123, 125-126]

The local board about the same time mailed him an Occupational Questionnaire which he filled out showing that completion of the engineering course at the University of South Carolina was indefinite; [25, 123, 126-127] that he was a student and a minister; had been in the ministry for four years beginning in 1938; [127] that the duties of his present job was to preach the gospel and that his only work was the ministry, which was the job for which he was best fitted. [127] Along with this evidence, he filed a copy of Opinion No. 14, Amended, of National Headquarters of Selective Service System showing the status of Jehovah's witnesses as regular and ordained ministers under the Act. [127-130]

On April 2, 1943, he was placed in Class I-A, making him liable for training and service in the armed forces. [8] He received notice of this classification through the mails on April 6, 1943. [130] Immediately he wrote the local board for a personal appearance. [131] On April 12, 1943, he appeared. [8, 131] The members of the local board summarily denied him the right to produce oral testimony and commanded him to file with the board the written

memoranda that he had with him. [131-132] Thereafter, on May 18, 1943, his classification was changed from Class I-A to Class I-A-O, making him liable for limited training and service in the armed forces as a conscientious objector. [8, 132] Immediately thereafter Smith requested another hearing, which was granted for May 25, 1943. [132] He appeared, this time without any written information because of the arbitrary action of the local board on his previous hearing in denying him the right to give oral testimony because he possessed written memoranda. [8, 131-132] The minutes of the local board show that there was a "lengthy discussion" at the hearing on May 25, 1943. [8] Petitioner testified as to the length of this discussion and the oral evidence submitted by him quite extensively, without objection on the Government's part. He testified on the witness stand for about forty-five minutes about the additional oral evidence he gave at his personal appearance. [132-142] He began the hearing by reviewing all the documentary evidence before the local board. [132-133] It is significant that the chairman of the local board had not seen any of Smith's documentary evidence before May 25, 1943. [134] The chairman admitted this in spite of the fact that the board had previously classified him in I-A on April 2, 1943, and had heard him at a personal appearance on April 12, 1943. [29, 35, 132] Smith pointed out that the undisputed documentary evidence corroborated by the affidavits of over forty people showed that he was regularly teaching and preaching as an ordained minister. [132] The chairman admitted there was no evidence of any kind or character in the draft board file to dispute the documentary evidence submitted by Smith. [29, 35]

Smith explained extensively at the hearing before the local board about his background, schooling and training for the ministry. [133-134, 136] He showed that he had pursued a diligent course of study for years at home under

the tutelage of his grandparents and his mother in preparation for the ministry. [133, 136] He also showed that he had regularly attended a divinity school two times each week, two hours each session for several years. [134, 137] He showed that the course of study covered the Bible, Bible research, Bible history, Bible concordances, public speaking, English and other subjects. [137] He showed that after he had completed these courses, his qualification for preaching was established, whereupon he was ordained and credentials of ordination duly issued to him. [137, 139]

On the occasion of such hearing, there was a discussion between him and the members of the board about whether he intended to finish his course in engineering and become an engineer. He pointed out, at that time, that upon his graduation from high school, he intended to enter the full-time ministry, that because his father was not one of Jehovah's witnesses and was prejudiced against his becoming a minister of Jehovah's witnesses and had threatened him, he had capitulated to his father's demands and enrolled in the engineering course at college. [135, 140, 141] He pointed out that even while he was pursuing the course of engineering he continued to regularly teach and preach as a minister devoting from thirty to eighty hours monthly therein. [135, 139] He showed that due to his increased activity in the ministry, he failed in a number of subjects in college. [135] Moreover, he told the local board that he was quitting college within thirty days and that he had actually filed a written application to become a full-time pioneer minister, representing the Watchtower Bible and Tract Society and that he would actually enter that missionary work on June 1, 1943. [140, 141] He showed that this was his actual intention at the time he graduated from high school and that he was going to put that lifelong desire into operation immediately, thereby changing his status from a part-time to a full-time minister and com-

pletely abandoning his status as a student in the engineering school at college. [141] He pointed out that his choice of minister as his life work was not a recent choice due to his being confronted with the draft law, but that when but a small child, he, his grandparents and his mother had chosen the full-time ministry as his profession and occupation to follow throughout life. [136, 141] He showed that the fact that he was ordained at an early age corroborated his claim as a minister and was no ground for denying his claim for exemption as a minister, because history and the Bible establish the fact that many ministers began preaching at a very early age. [140] In this connection he showed that he had completed the full prescribed course of study which is ordinarily given to adults, at the time he began practicing his ministry at the age of 14. [140] He showed that his duties as an ordained minister required him to act as assistant to the "company servant" and presiding minister of the congregation of Jehovah's witnesses at Columbia. [138-139] He showed that these duties required him to devote at least 80 hours monthly; [139] that he regularly delivered sermons before the congregation; [138] that he performed ceremonies ordinarily performed by ministers and that he stood in relation to the congregation of Jehovah's witnesses as do the clergy of the orthodox religions toward their congregations; [138] that he supervised the work done by Jehovah's witnesses in Columbia; [139] that he regularly performed missionary evangelistic work from house to house [137] and regularly made back calls upon the people and conducted Bible studies in their homes as various small congregations. [138]

The chairman of the local board testified that the members of said local board considered all this oral evidence which was offered at this concededly extensive hearing

and that they did not refuse to consider any of the evidence, but on the contrary gave full consideration thereto and that Smith received a fair hearing. [28-29] \*

It was especially important that the local board reduce to writing all of the oral evidence offered by petitioner at the hearing in view of the fact that petitioner at the close of the hearing asked the board if it was necessary for him to file any additional written evidence to corroborate the oral testimony and documentary proof that had theretofore been filed. In spite of his offer to produce an abundance of additional written proof the board informed him positively that it was not necessary that this be done. [141]

Again the chairman admitted that there was no evidence which was received by the board that in any way contradicted the evidence produced by Smith as to his ministerial activity, his intention to become a full-time pioneer minister, and his standing as a minister of the gospel with Jehovah's witnesses and the Watchtower Bible & Tract Society. [35-36, 37, 134]

At the close of the hearing Smith was excused for a few minutes and then called back and informed by the local board, on May 25, 1943, that his classification in I-A would be continued. [141, 142] On May 25, 1943, following the

\* The Regulations require that if oral evidence is given at a personal appearance, which is considered by the local board, it is the duty of the local board to prepare a summary of such evidence in writing and file it in the cover sheet of the registrant for the consideration, use and benefit of the board of appeal and upon appeal to the President by the Director of Selective Service. (§§ 625.2 and 627.13(b)). It was especially important that the evidence at this hearing be reduced to writing because the chairman stated that the main and principal reason, if not the only reason, petitioner was denied his claim for the ministry was because he was studying to be an engineer. [29] The undisputed evidence at the hearing showed that he intended to discontinue studying at college and enter full-time pioneer missionary work, which would have required the local and appeal boards and the President to consider his case on the basis of his standing as a full-time missionary evangelist rather than as a part-time minister studying at college for engineering. [36-37, 148] See *Hull v. Stalter*, (CCA-7) 151 F. 2d 633.

hearing Smith emphasized that he was not requesting and would not accept classification as a conscientious objector but that his exclusive claim was as a minister of religion. [8, 143] In connection with this statement he filed a written notice of appeal on May 25, 1943. [143-144] The board of appeal classified him in I-A on June 15, 1943. [8, 145] Because one member of that board dissented, petitioner had the right of appeal to the President.\* This he did by filing a written statement of appeal to the President on June 22, 1943. [9, 145-146] On July 23, 1943, the President placed him in Class I-A, notice of which petitioner received August 8, 1943. [9, 146]

Having failed to secure his exemption from all training and service on appeal, Smith for the first time realized that the local board had falsely told him that he did not need to submit additional written evidence to corroborate his claim. [146] In view of there being nothing on file in writing to show the change in Smith's ministerial status, and to establish the abundance of corroborative oral evidence he had given at the hearing, Smith then set out to procure additional written evidence. He obtained extensive affidavits from 25 persons. [36-37, 146-147-148] He also prepared two elaborate written affidavits signed by himself. [148] This written proof showed his change of ministerial status from part-time to full-time minister and his having renounced his intention to pursue his engineering course further. [30-31, 36, 148] He also obtained an ordination certificate duly sworn to showing that he actually began performance of full-time pioneer ministry on June 1, 1943. [146, 148] This evidence in writing established all of the facts that he had submitted orally to the local board on May 25, 1943, [131-141] but which had been illegally and unlawfully withheld from the board of appeal and the President by the local board, contrary to the Regulations. Thereupon Smith took this new evidence to the Government

\* Section 628.2 of the Regulations.

Appeal Agent in Columbia, South Carolina, who was impressed with the importance of the new evidence. [147] The Government Appeal Agent, associated with said local board, immediately requested the board to reopen and reconsider petitioner's classification. [147, 150] The local board denied the request of the Government Appeal Agent, [147] whereupon Smith appeared before the board in person and requested them to reopen and reconsider his classification anew because the Selective Service System had not had a full and fair opportunity to obtain all the truth pertaining to his classification. [147, 150] This request was denied. [37, 147] The local board arbitrarily and capriciously held that this was not new evidence sufficient to warrant a reopening of the classification, in view of previous illegal withholding of the same evidence submitted orally from the appeal agency of the Selective Service System. [37]

On September 18, 1943, the local board ordered Smith to report for induction on September 30, 1943. [2, 9, 155] Smith, not intending to report, was kidnaped by some peace officers of the State of South Carolina at the instance of his father—not one of Jehovah's witnesses—and taken to Fort Jackson, South Carolina. [155] At this induction station he completed the selective screening process of the armed forces and, following his acceptance by the armed forces for training and service, he refused to submit to induction. [155] He remained at Fort Jackson until released by an order of the court below upon appeal from the judgment of the District Court for the Eastern District of South Carolina remanding him to the custody of the armed forces. [156-157]

The details of what happened to petitioner from September 30, 1943, to the date of his discharge are too well known to this court to require restatement.\*

\* See 53 F. Supp. 583; 148 F. 2d 288; 66 S. Ct. 423.

The trial court received the testimony of Smith's mother—one of Jehovah's witnesses—about his background and training. [48-51] She testified about his intention to enter the full-time ministry at the time he graduated from high school, [53] about his activity as a minister from 1938 to date, [52-61] which testimony corroborated that of petitioner.

Louis Smith, father of petitioner, testified that his son intended to enter the full-time pioneer ministry upon his graduation from high school. [63] He corroborated the testimony of Mrs. Smith and petitioner that he was prejudiced against his son becoming a minister of Jehovah's witnesses. [61-72] He said that his antagonism and threats were so severe that he forced his son to enter the University of South Carolina to prevent his becoming a full-time minister. [61-72] He said that he selected the course and made his son continue therein until 1943. [61-72]

Several other witnesses—all of whom, except one, were Jehovah's witnesses—testified extensively as to the training, background and activity of petitioner as a student preparing for the ministry and as a minister of Jehovah's witnesses. Their testimony corroborated in every respect the testimony of petitioner concerning his ministerial status and activity. [72-91, 91-93, 93-98, 99-111, 111-116]

### **How Issues Raised**

At the close of all the evidence petitioner moved for a judgment of acquittal on the grounds that the undisputed evidence showed that the orders of the administrative agency to be made without basis in fact, contrary to the undisputed evidence, in excess of statutory authority, without jurisdiction, contrary to the Act and Regulations, and contrary to the due process clause of the Fifth Amendment to the Constitution. [189-190] Moreover, it was asserted that the action of the administrative agency was

arbitrary and capricious. [189-191] In the motion it was claimed that there was no evidence showing that petitioner is not a minister of religion as claimed; there was no evidence before the local board, appeal board or the court showing the petitioner is not a minister of religion as claimed and established by his evidence; that the undisputed evidence showed that he was regularly performing duties as a minister of religion within the meaning of the Act and Regulations. [189-190] In the motion petitioner also contended that the undisputed evidence showed that the local board frustrated his appeal to the board of appeal by withholding evidence submitted to the local board and which was considered by it in that the local board refused and failed to reduce to writing oral evidence given by petitioner at his personal appearance. [191] Petitioner contended that the undisputed evidence showed that the local board had violated Sections 625.2 and 627.13(b) of the Selective Service Regulations in withholding such evidence from the board of appeal. [191] Moreover, petitioner contended that the local board illegally and capriciously denied him the right to have his case reopened and his ministerial status reconsidered. [192] It was claimed, as one of the grounds for the judgment of acquittal, that this action was contrary to Sections 626.1, 626.2 and 626.3 of the Regulations. [192] An additional ground for the judgment of acquittal was that the order to report on which the indictment was based was void on its face because signed by the Clerk of the local board who was not authorized to issue and sign the order in the manner required by the Regulations, Sec. 603.59. [192]

### **Specification of Error**

Upon this petition for writ of certiorari petitioner urges that the court below erred in not holding he was entitled to a judgment of acquittal at the close of all the evidence.

### Reasons Relied on for Granting the Writ

The failure of the court below to hold that petitioner was entitled to a dismissal of the indictment because the undisputed evidence showed that there was a violation of procedural due process by the administrative agency in withholding evidence from the board of appeal, by failure to reduce to writing evidence considered by the local board conflicts with *Kwock Jan Fat v. White*, 253 U. S. 454.

The holding of the court below that an issue of fact for determination of the jury sufficient to justify a denial of the motion for judgment of acquittal on whether petitioner actually gave additional evidence is in conflict with *Social Security Board v. Warren* (CCA-8, 1944) 142 F. 2d 974; *Walker v. Altmeyer* (CCA-2, 1943) 137 F. 2d 531; *Williams v. United States* (CCA-7, 1942) 126 F. 2d 129, cert. den. 317 U. S. 655; *Carroll v. Social Security Board* (CCA-7, 1942) 128 F. 2d 876.

The holding of the court below that the interest of petitioner under the circumstances was sufficient to raise an issue of fact for submission to the jury the question of whether the draft board violated due process of law is in conflict with *Mack v. Dailey* (CCA-2) 3 F. 2d 534, 538-539; *Burdon v. Wood* (CCA-7) 142 F. 2d 303, 305; *Mass. Protective Ass'n v. United States* (CCA-1) 114 F. 2d 304, 309.

If the Court fails to find a conflict between the decision of the court below and decisions of other circuit courts of appeals, then petitioner says that there is presented an important question of federal law which has not been, but ought to be, decided by this Court: Where the undisputed evidence shows that evidence was submitted at a hearing before an administrative agency and the records of the agency concededly establish that there was a failure to reduce it to writing, as required by the administrative regulations, does the interest of petitioner make the question of law become a question of fact for the jury to decide

merely because petitioner is interested in the outcome of the controversy?

The failure of the court below to hold that there was no basis in fact for the classification given petitioner and that, in denying his claim for exemption the board acted arbitrarily and capriciously, is in direct conflict with the holding of the United States Circuit Court of Appeals for the Seventh Circuit in *United States ex rel. Hull v. Stalter*, 151 F. 2d 633 where the facts are substantially the same as those in the case at bar. Moreover, the holding of the court below is out of harmony with the dictum expressed on the same question in *Lehr v. United States* (CCA-5) 139 F. 2d 919, 921-922, and in *United States ex rel. Trainin v. Cain* (CCA-2) 144 F. 2d 944, 949. The holding of the court below that petitioner's activity was nothing more than activity of a lay worker of a religious organization and was not that of preaching as a minister is directly in conflict with decisions of this court in *Murdock v. Pennsylvania* (1943) 319 U. S. 105, 106-109, 110, 111, 117, and *Follett v. McCormick*, 321 U. S. 573, where the facts in reference to the ministerial activity were identical with the facts in this case. In those decisions this court held that the activity of Jehovah's witnesses occupied the same high estate as do orthodox preaching from the pulpit. Furthermore, the court held that the preaching activity of Jehovah's witnesses was more than preaching. It was a combination of pulpit preaching and evangelism.

The narrow orthodox construction placed upon the terms of the Act and Regulations providing for exemption of ministers of religion is a decision on an important question that is probably in conflict with the applicable decisions of this court. *Trinidad v. Sagrada Orden de Predicadores de la Provincial del Santisimo Rosario de Filipinas*, 263 U. S. 578; *Helvering v. Bliss*, 293 U. S. 144.

There are important questions of federal law presented

upon this petition which have not been, but which should be, settled by this court. They are set out below:

(a) What is the proper definition of the terms "regular minister" or "duly ordained minister of religion" used in Section 5 (d) of the Act? (Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. § 305)

(b) Did Congress intend to confine exemption conferred by the Act to ministers of the orthodox religions?

(c) Did Congress intend to exclude from the exemption conferred by the Act the "regular" and the "duly ordained" ministers regularly or customarily performing their duties and who performed their ministerial services gratuitously?

(d) Did Congress intend that a regular minister of religion, regularly performing his duties, or an ordained minister customarily performing his duties, could be denied his exemption and the draft board denying it have basis in fact for its action because the minister attended college to further his education while not engaged in performance of his ministerial duties?

(e) Did Congress intend that a broad and liberal interpretation should be put upon the ministerial exemption in the Act so as to include the regular and duly ordained ministers of every recognized religious organization within the United States?

(f) Did Congress intend to limit the ministerial exemption provided in the Act to only some ministers of some denominations?

The decision of the court below interpreting the Act and Regulations is in direct conflict with the administrative interpretation placed upon the Act and Regulations by the National Headquarters of the Selective Service System in State Director Advice 213-B. The National Headquarters of the Selective Service System says that "the *regular* discharge of his duties as a minister is a most important factor in determining whether a registrant should be classified" as a minister of religion. (Emphasis added)

The court below in construing the Act and Regulations contradicts this statement.

The National Headquarters of the Selective Service System says that the "historic nature of the ministerial function of a registrant's *own religious organization must be taken into consideration in each individual case.*" (Emphasis added)

The court below in construing the Act and Regulations contradicts this statement.

The National Headquarters of the Selective Service System says that whether one of Jehovah's witnesses is to be classified as exempt "must be determined in each individual case based upon whether he *devotes his life* in the furtherance of the beliefs of Jehovah's witnesses, whether he *performs functions which are normally performed* by regular or duly ordained ministers of other religions, and finally, *whether he is regarded by other [of] Jehovah's witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.*" (Emphasis added)

The court below in construing the Act and Regulations contradicts this statement.

Additional federal questions are presented upon this petition which have not been, but which ought to be, settled by this Court:

(g) Did the refusal of the local board to reopen petitioner's case in September 1943 after having failed to reduce to writing evidence received and considered upon the personal appearance constitute arbitrary and capricious action on the part of the local board so as to warrant a dismissal of the indictment?

(h) Was the order to report for induction, not signed by a member of the local board but by the clerk who was not authorized by resolution duly adopted and entered in the minutes of the local board, a valid order?

The court below so far departed from the Selective Service Regulations covering the conduct of local boards, and misconstrued them, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision to halt the same. This case is one that should call for the exercise of this Court's supervisory power under the statute and the rules of this court.

WHEREFORE your petitioner prays that the writ of certiorari issue to the Circuit Court of Appeals for the Fourth Circuit directing such court to certify to this Court for review and determination on a day certain to be therein specified, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court. Petitioner further prays that the judgment of conviction entered by the District Court be here set aside, the indictment ordered dismissed and petitioner discharged from custody or, in the alternative, the judgment be reversed and the cause remanded for a new trial not inconsistent with this court's opinion, as ordered by the court below. Your petitioner should be granted such other and further relief as to this court may seem just and proper.

LOUIS DABNEY SMITH  
*Petitioner*

By HAYDEN C. COVINGTON  
CURRAN E. COOLEY  
GROVER C. POWELL  
*Counsel for Petitioner*

## SUPPORTING BRIEF

### *Preliminary*

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.\*

## ARGUMENT

### ONE

The local board denied Smith procedural due process in withholding from the board of appeal and the President, upon appeal, oral evidence received and considered by the local board upon a personal appearance, and thereafter in refusing to reopen his case upon a tender of written evidence covering the points the local board had previously failed to reduce to writing and forward to the board of appeal, as required by the Regulations.

The Regulations require that the local board reduce to writing and place in the registrant's file all oral evidence submitted by him pertaining to his occupational status and classification. Section 615.82 provides, *inter alia*, "Every paper pertaining to the registrant, except his Registration Card (Form 1) . . . shall be filed in his Cover Sheet (Form 53)."

"The registrant's classification shall be made solely on the basis of the official forms of the Selective Service System and such other written information as may be contained

\* For special reasons warranting the granting of petition submitted herein see conclusion of this supporting brief, pages 38-39, *infra*.

in his file; . . . Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." (Section 623.2. See also Section 625.2(b), Regulations.)

"If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts." (Section 627.13(b))

Section 627.13(b) of the Regulations required the local board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete." The local board disregarded the regulations and acted in complete defiance thereof, thus flouting the law and showing utter contempt for petitioner's right under the regulations.

The undisputed evidence showed that the local board failed to reduce to writing and place in Smith's file vital oral evidence submitted by him at a personal appearance relative to his status under the Act. When he was at the hearing he offered extensive additional oral evidence which was concededly received and considered by the local board. [28-29] The local board, although it did consider the oral evidence, did not reduce it to writing and place it in the cover sheet as required by the regulations. The board of appeal and the President did not see or have an opportunity to consider all the additional evidence. Neither of them knew of the action of the local board in withholding vital oral evidence received and considered.

Inasmuch as no classification is permanent (Sec. 626.1) it was especially the duty of the local board to receive additional written evidence following the return of the file by the President. Upon the return of the file, Smith

saw that he had been injured by false information given him by the local board that it was unnecessary to submit additional written evidence. The local board, having violated the regulations by failing to summarize in writing the oral evidence given by Smith, was required to receive the vast amount of documentary evidence offered to it in September 1943. The local board, as a matter of law, should have reopened and considered anew the classification as requested by the Government Appeal Agent and Smith when tendered Exhibit I containing a vast amount of documentary evidence irrefutably establishing all the facts given to the local board orally and considered by it on May 25, 1943, at the hearing.

Section 626.2 of the regulations provide that 'the local board may reopen and consider anew a registrant's classification upon written request of the Government Appeal Agent or the registrant, presenting facts *in writing* not considered when the registrant was classified which, if true, would justify a change in the registrant's classification.' It should be observed that the facts presented in writing were not considered by the board of appeal or the President who gave the final classification and who therefore did not have an opportunity to consider any of these facts set forth in the documentary evidence.

If a local board fails to reduce to writing oral evidence and which was received and considered by it, thus withholding such evidence from the appellate agencies of the Selective Service System, and thereafter refuses to reopen a classification upon the tendered written evidence showing the facts that were not considered by the appellate agencies, the local board will have been created an autonomous agency and the appellate agencies of the Selective Service System made impotent, null and void and forced to depend for their effective operation exclusively upon the whim, caprice and will of the local board. If the regulation on

reducing oral evidence considered by the local board to writing and the regulation on reopening a classification is each held to be for the benefit solely of the local board and that the judgment of the local board thereon is final, then the appellate agencies of the Selective Service System will have been deprived of their right to correct errors and illegal acts committed by the local board, contrary to the regulations.

Certainly Congress and the President did not intend to give the local boards unlimited power to withhold and keep from the appellate agencies evidence offered to it and considered by it under the regulations. This is especially true because classifications upon appeal are made *de novo* and such classification should be made according to the status of the registrant at the time of the classification rather than at the time of the registration of the registrant. *United States ex rel. Hull v. Stalter*, 151 F. 2d 633.

It seems inexorable that the local board should have reopened and reconsidered petitioner's classification, because of its arbitrary and defiant refusal and failure to reduce to writing petitioner's oral evidence received and considered by it at his personal appearance.

It was argued by the court below that *Cramer v. France* (CCA-9) 148 F. 2d 801, 804, and *United States ex rel. La Charity v. Commanding Officer* (CCA-2) 142 F. 2d 381, 382, are in point. These decisions held that a registrant did not have a right to reopen his case as a matter of right, and that the refusal of the administrative agency to reopen the classification was not ground for invalidating the subsequent orders commanding the registrants to perform military service. In neither case was it shown that the local board failed to comply with regulations prescribing the procedure for reducing to writing oral evidence and filing the same as required by the regulations.

In each case the board of appeal had opportunity to review and consider the evidence submitted on the request for reopening of the classification. In both cases the administrative agency accorded the registrants their rights of procedural due process. Inasmuch as the board of appeal did not have opportunity to review the illegal action of the local board by reason of its withholding oral evidence, contrary to the regulations, and its purloining the documentary evidence submitted by petitioner later on, there was a rank denial of the right of procedural due process which distinguishes the *Smith* case from the *Cramer* and *La Charity* cases, *supra*.

In *Kwock Jan Fat v. White*, 253 U. S. 454, the administrative agency omitted and suppressed testimony of important witnesses favorable to the applicant. On appeal to the Commissioner of Immigration, the administrative determination was affirmed. In spite of the fact that Congress had given great power to the Secretary of Labor in the exclusion of Chinese immigrants, the court said:

"It is a power to be administered not arbitrarily and secretly, but fairly and openly under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts in proceedings for review to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural-born citizen of the United States should be permanently excluded from his country."

The withholding of evidence by the local board denied

the final and real classifying agency of the Selective Service System the right to a full review of petitioner's case. The act of the local board was tantamount to a denial of the right of appeal. It is a denial of procedural due process so as to make the order upon which the indictment is based void and the same as though no order had been issued. Under these circumstances the court below should have held that the illegality of the order was ground for a dismissal of the indictment and a remand of the case to the Selective Service System. *Tung v. United States* (CCA-1) 142 F. 2d 919. The decision of the court below conflicts directly with the *Tung* decision. Cf. *United States v. Peterson* (USDC-ND Calif.) 53 F. Supp. 760; *United States v. Lair* (USDC-ND Calif.) 52 F. Supp. 393; *Ex parte Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for certiorari, which was available to it.

How it can be expected that the evidence upon another trial will be different is difficult to comprehend. The chairman of the board admitted that the board considered all the evidence given by Smith at the May 25 hearing. The records of the board show that none of the evidence was reduced to writing as required by the Regulations. Even the records of the board show that the hearing on May 25 was extended and long. The Government in the trial below made no effort to contradict the testimony of Smith. It must be assumed for purposes of decision of this question that the evidence was fully developed and no good purpose will be subserved by remanding the case to the trial court for another trial. The court below erred in holding that the evidence may be different on another trial.

## TWO

The administrative agency, at the time of the final classification, acted arbitrarily and capriciously, contrary to the undisputed evidence, and without basis in fact, when it denied petitioner his claim for exemption as a minister of religion, all of which action was in excess of the jurisdiction of the administrative agency and contrary to law.

The petitioner was entitled to be classified according to his status as of the date of the last classification. His status was not to be determined as of April 6, 1943, when the local board classified him for the first time. It is not to be determined as of May 18, 1943, when he was placed in Class I-A-O. Moreover, his status is not to be determined as of May 25, 1943, when he appeared before the local board. The determination of his status must be according to his status as it existed on the date the President classified him in August 1943. It should be remembered that in August 1943, he had been a full-time pioneer missionary for more than three months. He had informed the local board in May 1943 of his intention to discontinue his engineering course at the university and enter the full-time ministry, which it had been his intention to do ever since he graduated from high school. The undisputed evidence shows that at the time of his final classification, in August 1943, he was acting as a full-time pioneer minister. Moreover, it shows that he was acting as assistant to the presiding minister of the Columbia, South Carolina, congregation of Jehovah's witnesses. It established beyond cavil that he stood in relation to that congregation as do the orthodox clergy of the more popularly recognized denominations. The evidence showed that his entire life was devoted to the furtherance of the teaching and preaching of the principles and

beliefs of Jehovah's witnesses. Therefore, as a matter of law, petitioner was entitled to be classified in IV-D as a minister of religion as of the date the President classified him in August 1943 and his status as a part-time minister as of April and May 1943 is wholly immaterial.

This conclusion here contended for is supported by the decision of the Seventh Circuit Court of Appeals in the case of *United States ex rel. Hull v. Stalter*, 151 F. 2d 633. There the facts were on all fours with the case at bar. There Hull—one of Jehovah's witnesses—filed a questionnaire showing he was preaching the gospel as a part-time minister of Jehovah's witnesses and was engaged in secular work as a stenographer for a pottery company in Crooksville, Ohio. Like Smith, he had been intending all his life to enter the full-time ministry. Before his final classification he informed the local board that he intended to start in the full-time ministry in September 1941. However, he did not actually begin in his assigned territory until October 1941. On September 18, 1941, the local board placed him in Class I-A-O. In other words, like Smith, while his case was pending before the local board, he changed his status from part-time to full-time minister. The Seventh Circuit Court of Appeals held that the District Court was correct in concluding that Hull was entitled to be classified as of the date of his final classification.

It is conceded that Jehovah's witnesses and their legal governing body have been duly recognized by the Selective Service System under the Act and Regulations as being a religious organization within the meaning of the Act.\* Moreover, it has been administratively determined that ministers of that organization regularly preaching and teaching as ordained or unordained ministers are entitled to classification in Class IV-D.\* The undisputed evidence before the draft board and before the court below showed

\* Opinion No. 14, amended November 1942. [256-260]

that at all times material herein defendant never had any secular employment. The undisputed evidence at the time of his final classification was that he was engaged regularly in teaching and preaching to others as a minister of Jehovah's witnesses and presiding over the local congregation. Not only did he devote 80 hours monthly while attending college to the performance of his ministerial duties, but also devoted other time to regularly preaching and delivering sermons before the congregation. The congregation recognized him as standing toward its members in the same capacity as do the orthodox clergy of the more popular religious organizations. He was duly authorized to act as the assistant to the presiding minister. In this connection the evidence shows that petitioner devoted more time to the preaching work than did the presiding minister. Because of this the presiding minister delegated to petitioner much of his responsibility and duty. The presiding minister was engaged in secular work six days weekly, devoting only part of his time to preaching. However, his local board placed him in Class IV-D, exempting him as a minister of religion.\*

His standing, activity, preaching from the pulpit and congregational duties brought petitioner squarely alongside the popularly recognized standing of clergymen of the more favored and more readily recognized religious organizations. His activity as a missionary evangelist, being primarily ordained and authorized to preach as such, and regularly engaged as such, alone should be sufficient basis to justify a IV-D classification. However in addition to his activity, he performs the congregational duties which fortify his claim as a minister. This makes

\* It should be observed that the board that granted presiding minister Crout exemption as a minister was different from the board with which petitioner was registered, but showed a disposition to be fair and not, as petitioner's draft board, arbitrary and capricious as is manifest from the record.

it impossible for the Selective Service System lawfully to say that he is not a minister of religion within the meaning of the Act and Regulations.

Smith did not become a minister when he began to do pioneer service. Undisputed evidence showed he was a minister before he became a full-time pioneer minister.

"The phrase 'minister of religion' is wide enough to embrace any evangelical office, and has about it more of the savor of humility than 'pastor'." *Encyclopædia Britannica* (13th ed.) Vol. 18, p. 542.

"Minister" or "minister of the gospel" is a comprehensive term and of uncertain significance. Ministers are spoken of as public teachers of piety, religion and morality. (New Hampshire Constitution, Art. 6) They are sometimes called "ministers of the gospel" and sometimes "ordained ministers of the gospel", a term less comprehensive in its significance. *Kidder v. French*, N. H., Smith, 155, 156.

A statute pertaining to authority to perform marriages by clergymen includes ministers of every denomination and faith. *Haggin v. Haggin*, 35 Neb. 375, 53 N. W. 209, 211.

"Ministers" as used in a tax exemption statute includes a person elected by a Methodist society to be one of their local preachers, and ordained as a deacon of the Methodist Episcopal Church though he had no authority to administer the sacrament of the communion. *Baldwin v. McClinch*, 1 Me. (1 Greene) 102, 107.

In the case of *Ex parte Cain*, 39 Ala. 440, in determining whether or not the part-time minister attempted to be drafted under the conscription act of the Confederacy during the Civil War was entitled to exemption, the Alabama Supreme Court aptly states the limitation of the judiciary in passing upon matters spiritual in so far as they pertain to the activity of a minister claiming exemption, saying: "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any reli-

gious sect or denomination. It does not vary the question, in the present case, that Mr. Cain belonged to a sect of religionists, who perform ministerial labor gratuitously."

The same liberal interpretation that was placed upon the Act and Regulations, and as construed and applied to the activity of one of Jehovah's witnesses upon facts identical to the facts here, by the Seventh Circuit Court of Appeals, should be adopted by this court and applied to the facts in this case so as to reach the same conclusion as was reached in *United States ex rel. Hull v. Stalter*, 151 F. 2d 633. That court said:

" . . . In our view, every registrant, whether he be Jehovah's Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. A registrant is not entitled to exemption merely because he professes to be a minister, but he is entitled to such exemption if his work brings him within that classification.

"Selective Service Regulations (622.44) recognize two classes of ministers, (1) a regular minister of religion, and (2) a duly ordained minister of religion. The former 'is a man who customarily preaches and teaches the principles of religion of a recognized charge [*sic*, properly 'church'], religious sect, or religious organization of which he is a member \* \* \*.' The latter 'is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church \* \* \*.' The Selective Service System has even more broadly defined the term 'regular minister of religion.' Under the heading, 'Special Problems of Classification' (Selective Service in Wartime, Second Report of the Director of Selective Service, 1941-42, pages 239-241), it is stated: 'The ordinary concept of "preaching and teaching" is that it must be oral and from the pulpit

or platform. Such is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or its goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message "from housetops" or write it "upon tablets of stone". He may give his "sermon on the mount", heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the cross. \* \* \* He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion. \* \* \* To be a "regular minister" of religion the translation of religious principles into the lives of his fellows must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant."

The only two circumstances relied upon by the draft boards in not granting petitioner his ministerial exemption and classification in Class IV-D were (1) that the information in his questionnaire showed that he was going to college studying to be an engineer, and (2) the fact that his name was not listed with National Headquarters of the Selective Service System. He satisfactorily explained his reason for attending college. He showed beyond cavil that his lifelong desire was to become a minister. The only reason he attended college was because of fear of his father. However, the facts showed without dispute that he flunked his college course because of devoting too much of his time to the ministerial work. The fact that his name was

not on the certified official list cannot be taken as grounds for denial.

The certified list circulated by National Headquarters did not include all male pioneers, full-time ministers, because at the time of the first registration only the names of individuals between the ages of 21 and 35 were required to be submitted by National Headquarters. Shortly after the list was completed in June 1941 it was anticipated that names of other full-time ministers would be added to the certified official list. The Selective Service System promulgated a policy allowing for the addition of names to the list upon application made by the Society supported by affidavits of persons familiar with the background and activity of the person whose name was to be added to the list. Upon the February 1942 Selective Service registration a number of full-time pioneer ministers of Jehovah's witnesses were automatically added to the list because of their having been in the full-time missionary evangelistic work on June 12, 1941, when the first certified official list was promulgated. The reason their names were not on the original certified official list was because they were not of the age bracket then liable for training and service.

The method of investigating each new individual application of a new full-time pioneer to be added to the list put a heavy burden upon the limited stenographic force and personnel of the section of the National Headquarters of the Selective Service System having charge of the classification of Jehovah's witnesses. Moreover, objections were raised by some local boards that the National Headquarters was encroaching upon the original jurisdiction of the local boards in matters of classification by addition of a registrant's name to the certified list. Accordingly, on October 29, 1942, by State Director Advice No. 88, the National Director of Selective Service changed the policy regarding the adding of names to the official list, and discontinued the practice of

placing new names upon the certified list. On November 2, 1942, Opinion No. 14 was amended so as no longer to require that a full-time pioneer missionary evangelist of Jehovah's witnesses have his name upon such certified list. The Opinion provided: "The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion." [259]

The failure of one of Jehovah's witnesses to have his name to appear upon the certified official list circulated by the Director of Selective Service to all State headquarters in the Selective Service System does not militate against his claim for exemption as a minister of religion. It is the duty of the draft boards to consider the facts as revealed by the registrant's file and to classify him according to the Act and Regulations. If it appears that one of Jehovah's witnesses is actually engaged in regularly preaching the gospel of God's kingdom under the direction of a recognized religious organization, the mere fact that his name does not appear on the certified official list of pioneer ministers referred to in State Director Advice No. 213-B does not authorize the board to reject his claim for exemption as a minister of religion. This is the view taken by the Government in its brief filed in *Benesch v. Underwood* (CCA-6) 132 F. 2d 430. There the Government informed the court that "the inclusion of Benesch's name on the list of 'Pioneers' maintained at National Headquarters would not, *ipso facto*, entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local boards."

The two grounds of objection urged by the Government

in the court below against petitioner's claim for exemption as a minister of religion are unequivocally answered by the Seventh Circuit Court of Appeals in its decision in the *Hull* case (151 F. 2d 633) where the court said: "True, his questionnaire disclosed that he was not a full time minister, part of his time being devoted to secular occupations. The questionnaire, however, also disclosed that commencing September 1, 1941, he expected to cease his secular activities and devote all of his time to ministerial work. That his intention in this respect was fully performed is not open to dispute. There is not a scintilla of evidence upon which a contrary conclusion or even a reasonable inference could be predicated. The fact that his name was not included as a minister of Jehovah's witnesses at National Headquarters of the Selective Service is of little or no consequence under the facts of the case. While it perhaps was a circumstance to be considered by the Board, it constituted no proof as to relator's actual status. Furthermore, the practice of placing names upon this list was discontinued by the National Director of Selective Service on November 2, 1942 (relator was finally classified February 3, 1943)."

Reference is here made to Petitioners' Joint Brief in *Smith v. United States* and *Estep v. United States*, Nos. 66 and 292, October Term 1945, under point FIVE, pages 131-190, and to Petition for Writ of Certiorari in *Swaczyk v. United States*, No. 290, October Term 1946, where this point has been extensively argued. That argument is incorporated here as though copied at length herein.

### THREE

**The undisputed evidence shows that the order of the administrative agency commanding Smith to report for induction was invalid because not issued or signed by a member of the local board as required by the Regulations. Therefore it is an invalid order and a nullity.**

The undisputed evidence showed that the clerk signed the order to report for induction. [10] The undisputed evidence showed that this order was not authorized by a resolution entered in the minutes of the local board. [11-12, 18-19] Section 603.59 of the Regulations authorizes a clerk to sign official papers of the local board which includes an order to report for induction only when directed by the local board so to do through a resolution duly adopted by and "entered in the minutes of such local board". It should be remembered that "The authority of the local boards whose orders are the basis of these criminal prosecutions is circumscribed both by the Act and by the regulations. . . . ¶Any other case where a local board acts so contrary to its granted authority as to exceed its jurisdiction" is invalid and vitiates the criminal proceedings. *Estep v. United States*, 66 S. Ct. 423, 426-427.

It is true that the chairman of the local board testified, over the objection of petitioner, that the members of the local board authorized the clerk to sign. However, the undisputed evidence shows that no entry in the minutes of such resolution was ever made, in spite of the fact that the local board had, according to the undisputed evidence, a minute book at all times that the board was in operation.

Moreover, even the testimony of the chairman failed to show that the particular clerk who signed the order issued to petitioner was authorized by the board to sign the order.

He testified that when the board was first established the clerk then serving was authorized to sign, but the evidence showed that there was a different clerk at the time here involved. At the time of the Smith order, a new clerk had been appointed. There is absolutely no evidence to show that the clerk serving when he sent the order to Smith was ever authorized at any time to sign any order or paper. The failure of the board to comply with the regulations by entry of the alleged resolution invalidates entirely the alleged oral order given by the members of the board to the clerk authorizing him to sign the papers, if the board in fact ever gave such order.

The testimony of the chairman is highly unsatisfactory. It savors of fabrication. The chairman first attempted to justify his testimony that no minutes were made of such a resolution on the ground that at that time no minute book was kept by the board. When the minute book was produced, he was impeached because it appeared that the board had a minute book ever since its inception, and particularly at the time the chairman alleged that the resolution was made. The effort of the chairman to explain this is wholly unsatisfactory.

In any event, regardless of the testimony of the chairman in his vain effort to bolster the signature of the order by the clerk, the very fact that the Regulations required that the resolution be recorded in the minutes, and the undisputed evidence that there was no entry made, nullify, as a matter of law, all the testimony which was foisted upon the court and jury by the Government and its witness, the local-board chairman.

The Regulation is mandatory. It cannot be circumvented by a judicial holding that the Regulation is immaterial, technical. All laws are technical. Violation of any essential technicality of a law is as much a violation as is a more serious infraction. If one element of law can be set aside

as inconsequential, then the entire law, indeed, all laws, can be set aside as being of no consequence.

The clerk's error in signing *without authority* the order to report invalidated it. That error is underscored by the board's error in omitting to make due record of even its claimed informal empowering of the clerk.

The clerk's unauthorized act destroyed the order as the basis for indictment of the registrant, as much as though the order had been unsigned, or the signature had been forged by a stranger unauthorized to sign. Here due authorization and authorization of record are of the very essence of the administrative process. Omission of the act of authorization and of the due recordation of such act jointly constitute a basic and fatal defect. Neither judicial dictum nor judicial silence respecting those omitted essentials can cure that fatal defect.

### Conclusion

It is necessary for the Supreme Court to grant the writ of certiorari so that the Government and petitioner may know whether or not he is entitled to a judgment of acquittal upon the evidence as it stands now. The evidence on another trial will not be materially different than it is at this time, especially with respect to (a) the violation of petitioner's rights by the local board's failing to reduce to writing the oral evidence it considered on the hearing held May 25, 1943, (b) the local board's failing and refusing to reopen his case after a miscarriage of administrative appellate process, and (c) the local board's failure to properly authorize its clerk to sign the order to report for induction as is required by the Regulations.

The petitioner, upon all the evidence, being found by this Court to have been entitled to a directed verdict and a judgment of acquittal, he is entitled to know that now so as to avoid another trial. The court below has sent him back

to the district court for his *fourth* hearing and trial. This case ought to be terminated now if petitioner is entitled to its termination as a matter of law. Certainly he should not be put to the inconvenience of trying the case over again, taking another appeal to the circuit court and then coming again to this Court when the questions can be determined now by this Court and settled once and for all.

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the errors committed; and petitioner further prays that the judgment rendered by the circuit court of appeals be modified so that the judgment of the district court against petitioner will be reversed and petitioner discharged or, in the alternative, such relief being denied, that the judgment of the court below be affirmed so that the judgment of the district court will stand reversed and a new trial ordered.

Respectfully submitted,

HAYDEN C. COVINGTON  
CURRAN E. COOLEY  
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*Counsel for Petitioner*

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM 1946**

**No. 534**



**LOUIS DABNEY SMITH, *Petitioner***

**v.**

**UNITED STATES OF AMERICA, *Respondent***



**ON PETITION FOR WRIT OF HABEAS CORPUS  
TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

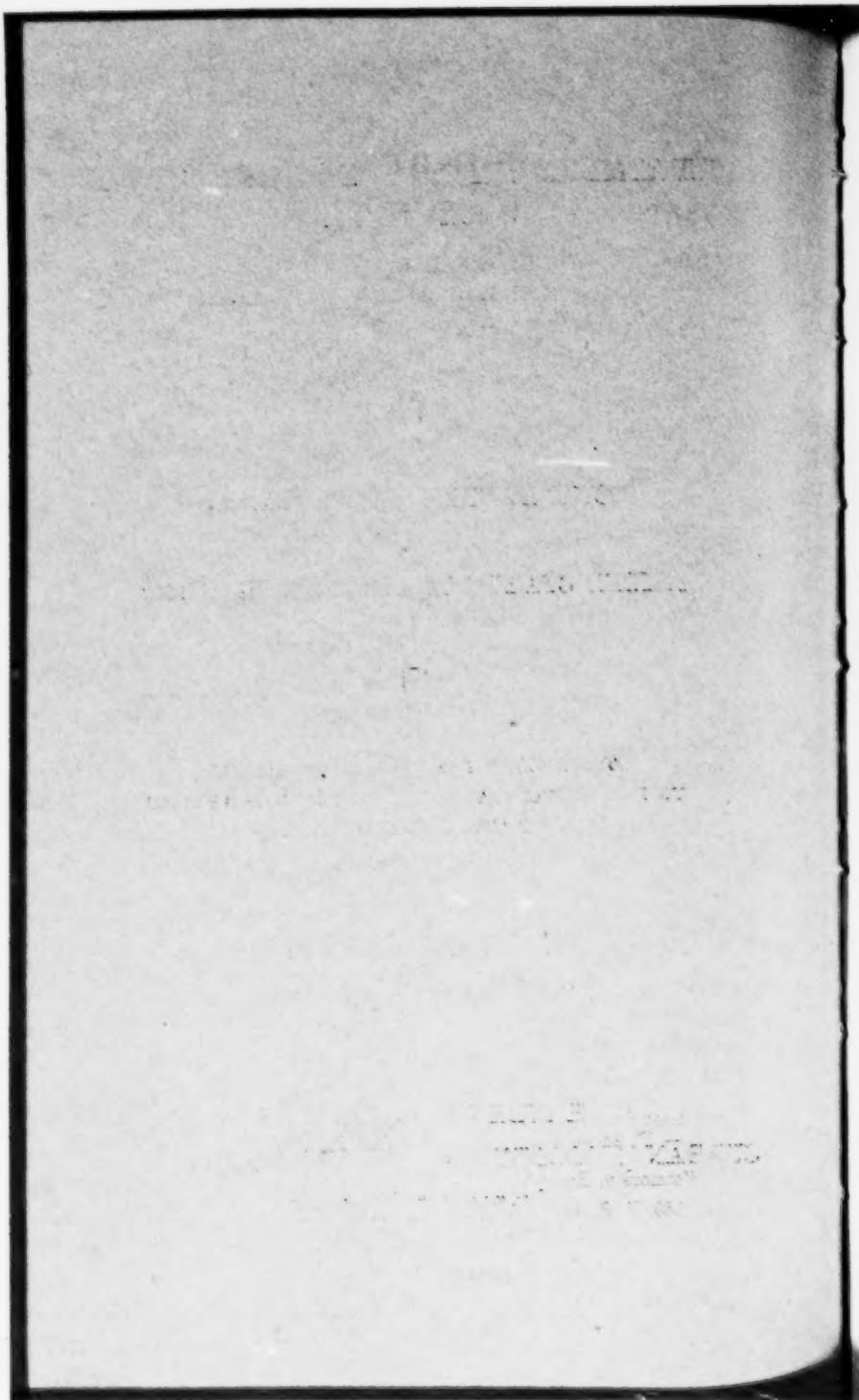
**PETITIONER'S REPLY  
to Brief in Opposition**

**HAYDEN C. COVINGTON**

**CURRAN E. COOLEY**

**GROVER C. POWELL**

***Counsel for Petitioner***



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**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1946

**No. 534**



LOUIS DABNEY SMITH, *Petitioner*

*v.*

UNITED STATES OF AMERICA, *Respondent*



ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

**PETITIONER'S REPLY  
to Brief in Opposition**

MAY IT PLEASE THE COURT:

There was absolutely no question of fact as to whether petitioner did in fact furnish new oral information to the local board. The memorandum of additional proceedings appearing on the questionnaire (Government's Exhibit 2 [8]\*) showed that on May 25, 1943, there was an extended hearing, at which petitioner appeared and gave evidence. Moreover, the chairman of the local board testified that the board "gave him as long a hearing as it was possible to give him." [29] While it is true that the chairman of the local board said he did not remember about Smith stating that he would quit college, the fact is that the chairman did not

\*Figures in brackets [ ] denote pages of the printed transcript of record.

remember anything about the contents of the file. His whole testimony in reference to the case was that he did not "remember anything about that at this present moment". He relied entirely upon the record, saying, "The records are here." [30, 32]

After Smith had finished his testimony and the defendant rested his case, the Government did not attempt to contradict any of the testimony of petitioner about the new oral evidence he gave at the hearing. That evidence remains undisputed. [132-142]

The records of the draft board and the testimony of the Government's witnesses establish that there was an extended hearing at which evidence was received and considered. This fact is considered by the Government.

The fact that the Government does not believe that Smith told the board what he said he told them does not raise an issue of fact as to whether he had a hearing at which evidence was given, received and considered. The chairman admitted that the board considered what Smith had to say while he was before the board. [29] In view of the Government's failure to offer any evidence whatever to contradict what Smith stated, this should be taken as a confession that what he did state was true. "The rule invoked, it seems to us, ought not to be applied when the fact testified to is one which the opposing party is able, as in the case just referred to, to introduce testimony to contradict, and fails to do so." *Missouri K. & T. Ry. v. Stone*, 1910, 58 Tex. Civ. App. 480, 125 S. W. 587.

It has been held that a liberal presumption ought to be indulged in favor of the one party where the other party fails to produce evidence. (*Wetmore v. Rymer*, 169 U. S. 115) It is well settled that if a party fails to produce the testimony of available witnesses on a material issue, it may be inferred that the testimony of the witness, if presented, would be adverse to the party who fails to call the witness.

*Mammoth Oil Co. v. United States*, 275 U. S. 13; *Graves v. United States*, 150 U. S. 118; *Culbertson v. The Southern Belle*, 18 How. (U. S.) 584; *The New York*, 3 Wheat. (U. S.) 54; *Stocker v. Boston & M. R. Co.*, 84 N. H. 377; *Bethlehem Steel Co. v. N. L. R. B.*, 74 App. D. C. 52, 120 F. 2d 641; *Tully v. Fitchburgh R. Co.*, 1883, 134 Mass. 499.

The Government argues extensively that the veracity of Smith's testimony concerning the May 25 hearing is drawn in issue because of his failure to raise this point of procedural law in his appeal to the board of appeal, in his petition for reopening of the classification, in his petition for writ of habeas corpus (*Smith v. Richart*, 53 F. Supp. 582), and upon the trial of his first indictment. (*Smith v. United States*, 148 F. 2d 288)

Concerning Smith's omitting to mention in the appeal the violation of the Regulations by the local board by its failure to reduce to writing the evidence upon his personal appearance, and request for reopening of the case before the local board, the answer is plain and simple. Smith was a layman. He was not familiar with the Regulations that place the duty upon the local board. His omitting to complain about this to the local board did not constitute a waiver of the duty of the board to comply with the law. The duty was upon the board to comply with the Regulations. The board's failure thus to comply cannot be cured by the ignorance of the registrant-petitioner. While ignorance of the law may excuse the petitioner, his ignorance does not relieve the board whose obligation it was to know the law governing its duties under the Regulations with respect to preparation of the record upon appeal. It is mandatory for a federal court to cause the testimony of a case to be recorded by the stenographer. Certainly no one would have the audacity to argue that an uninformed defendant, not represented by counsel, waives his right to have the testimony and proceedings recorded and tran-

scribed for use upon appeal purely because he was unaware of the law and omitted to complain about it at the time.

Smith was unaware that the law required the board to reduce the oral testimony to writing until he was advised by his counsel for the first time upon preparation for the trial in the court below under the present indictment.

The court of appeals held that Smith's omitting to make mention of the violation of the Regulations in his appeal or in his request for reconsideration could not be taken as grounds for holding that he did not submit evidence at the hearing. [349-350] It was merely a privilege that Smith had to make mention of this fact upon appeal. There was no duty imposed upon him to do so, especially in view of his ignorance of the Regulations and the law.

Smith's omitting to make mention of this matter in previous hearings in the federal district court at Columbia, South Carolina, is also satisfactorily explained. The habeas corpus case styled *Smith v. Richart* (53 F. Supp. 582) was disposed of upon the decision of this court in *Billings v. Truesdell*, 321 U. S. 542. *Smith v. United States*, 148 F. 2d 288. Upon the trial of the first indictment in the district court, following Smith's release on the writ of habeas corpus, the trial court excluded all evidence with regard to the draft board action and forbade Smith to give any testimony whatever with respect to the alleged illegality of the draft board action. That ruling of the trial court upon that trial was erroneously based upon the *Falbo* decision. (320 U. S. 549) Because there the trial court had rejected proper evidence this court reversed the judgment rendered against Smith under the first indictment. *Smith v. United States*, 327 U. S. 114. Compare *United States ex rel. Kulick v. Kennedy* (CCA-2) — F. 2d —, decided October 29, 1946.

The first time that Smith really ever had a chance to extensively and adequately litigate the illegality of the administrative action was in the trial of the second indict-

ment in this case in the court below. There the matter was timely raised. Although now the Government argues exhaustively that the fact that this was not raised until the most recent trial of this case in the district court justifies this court in concluding that Smith testified falsely about the evidence he offered, it should be remembered that both the United States Attorney and Mr. Shapiro of the Department of Justice, who now makes this argument, did not question Louis Dabney Smith in any manner whatever about his having omitted to testify as to these facts on any former trial. Mr. Shapiro appeared and sat with the United States Attorney in the trial of this case in the district court. He also made an extensive argument. [44-48] The court heard him upon the law as to the scope of review of the draft board determination in this case in the trial court. [45-48] If Smith were lying about this and if the Government were sincere about the want of veracity of the petitioner in this case as to what took place at the named personal appearance, it seems that when during the trial they discerned Smith's omitting to testify on that subject the attorneys for the Government would have cross-examined Smith about this matter. That they wholly failed to do. Their failure to examine and assail the veracity of Smith about this matter in the district court should be taken as a confession on the part of the Government that Smith's testimony in this respect was true. (See the cross-examination of Smith [159-186]; note that the Government's attorney nowhere even intimates that Smith was lying.) Not one single question was asked Smith by the United States Attorney on this matter which the Government now complains about. It is highly unfair for the Government to assail the credibility and veracity of a witness for the first time in the Supreme Court of the United States when there is nothing in the record upon which to base the attempted impeachment of the witness' testimony. This is especially

reprehensible in view of the fact that the United States District Attorney who heard his testimony in the several trials referred to failed to cross-examine Smith about the matter.

The Government's attorneys knew that Smith had testified in two former trials while they heard him give testimony about this in the district court. Why did they not question him about the matter at the time, instead of attempting to impeach him for the first time in the Supreme Court of the United States?

The Government says that this question can be fully explored on the retrial of the case by questioning members of the local board and Smith. The evidence is obviously fully developed. If the board members had testimony to contradict Smith, why didn't the Government call the members of the local board to the witness stand to contradict Smith? As appears from the above cited cases, the failure on the part of the Government to contradict the testimony of Smith can rightly be taken as a confession that if such members had been called their testimony would have corroborated the testimony of Smith rather than impeach it, as the Government now is wont to have this court believe.

Yet the Government now has the audacity to suggest that upon another trial the testimony of the board members may contradict Smith's testimony. That the Government does by inferentially stating, "If petitioner's story is true, it undoubtedly will find support in the testimony of these persons." (Br. p. 18) Certainly that weak, equivocal statement of the Government does not overcome the rule of law with reference to the presumption about the failure to call witnesses obviously within the control of the Government. Smith should not be put to another trial in the district court solely because the board members failed to testify on this matter in the court below.

The mistakes of the Government in its trial of cases

should not be made the basis of remanding cases to trial courts for retrial, when upon the record it is the duty of the courts to reverse judgments and order the indictments dismissed.

In this case it plainly appears that the evidence is fully developed and that no justice can be gained by ordering a new trial in the district court upon this issue.

WHEREFORE petitioner prays that the writ of certiorari be granted and that he be given an opportunity to argue whether, in the circumstances of this case, the judgment should be reversed and the indictment ordered dismissed rather than that a new trial be ordered.

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October 29, 1946

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# In the Supreme Court of the United States

OCTOBER TERM, 1946

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No. 534

LOUIS DABNEY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH  
CIRCUIT*

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals  
(R. 340-353) is not yet reported.

## JURISDICTION

The judgment of the circuit court of appeals was entered July 29, 1946 (R. 353-354). On August 6, 1946, the time for filing a petition for a writ of certiorari was extended by the Chief Justice through September 27, 1946 (R. 357) and the petition was filed September 25, 1946. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

#### QUESTIONS PRESENTED

1. Whether the evidence supports the jury's finding that the local board did not receive oral information from petitioner which it failed to reduce to writing.

2. Whether the denial of petitioner's claim to classification as a minister of religion has any basis in the evidence which was before the Director of Selective Service as the final classifying agency.

3. Whether the order to report for induction which was issued by the local board and signed by the board's clerk at the direction of the local board is invalid because the clerk's authority to sign the order was not recorded in the board's minute book.

#### STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act and of the Selective Service Regulations are set forth in the Appendix, *infra*, pp. 26-33.

#### STATEMENT

This is another aspect of the litigation which was before this Court in *Estep v. United States*, 327 U. S. 114. On March 18, 1946, after the de-

cision of this Court reversing petitioner's conviction for failing to report for induction, petitioner was re-indicted in the District Court for the Eastern District of South Carolina in one count charging that he wilfully refused to submit to induction as ordered by his local board, in violation of Section 11 of the Selective Training and Service Act of 1940 (R. 2). He was convicted after a trial by jury and was sentenced to imprisonment for three years and six months (R. 1).

At the trial it was stipulated "that on September 30, 1943, after undergoing the selective process and the screening process of the armed forces at the induction station, the defendant was accepted for training in [and] service in the United States Army, and was thereafter ordered to undergo the induction ceremony process, or, rather, the induction process ceremony. The defendant, Louis Dabney Smith, Jr., thereupon refused to submit to induction, and was thereafter released and charged with violation of the Selective Service Act of 1940" (R. 3-4). The sole disputed issue concerned the legality of the induction order and the underlying classification (1-A) given petitioner by the selective service agencies. The evidence adduced at the trial bearing on that issue may be summarized as follows:

On December 24, 1942, petitioner registered under the Selective Training and Service Act with Local Board No. 68, Columbia, South Carolina (R. 5, 118). In January 1943, he filed his

selective service questionnaire in which he stated, *inter alia*, that he was born on October 4, 1923; that he had been a student for the past year and one-half at the University of South Carolina, studying engineering; that he was working for a "B. S. Degree" and that he expected to take an examination for a license in engineering;<sup>1</sup> that from 1938 his occupation had been that of an ordained minister of religion;<sup>2</sup> that he was conscientiously opposed to both combatant and non-combatant military service; and that "in view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class 4D" (R. 6-7).

On February 8, 1943, petitioner filed Form 47, a form provided for registrants claiming exemption from military service as conscientious objectors. In that document (R. 119-122) petitioner stated that "I have consecrated myself to do the will of Almighty God, therefore I am a Christian, and being in covenant relationship with Almighty God, I cannot conscientiously bear arms or take part in any military movement because I believe to do so would be in violation of God's will \* \* \*"; that his beliefs were founded on his study of the Bible under the direction of the

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<sup>1</sup> In summarizing his educational training, petitioner also stated that he had taken a "home study course for the ministry, 4 years" (R. 6).

<sup>2</sup> Petitioner described his ministerial activities as those shown "at Acts 20: 20 and Luke 8: 1 in the Bible" (R. 6).

Watchtower Bible and Tract Society; that "I have devoted on the average of 20 hours per week for the last four years studying and preaching the gospel of God's kingdom \* \* \*"; that his "public expression" of his beliefs consisted of expressing "my own personal views" when questioned; that he was a student at the University of South Carolina; that he had been engaged in ministerial work from 1938 to date; that he became a member of the Jehovah's Witnesses sect in 1938 "by studying literature of Jehovah's Witnesses with the Bible"; that the "church, congregation, or meeting" which he customarily attended was "Kingdom Hall" and that "H. L. Crout (company servant)" was the leader or pastor of Kingdom Hall; and that the Jehovah's Witnesses sect has no official position in regard to participation in warfare and that it "leaves the matter entirely up to each individual to decide for himself."

In addition to these documents, petitioner filed two statements signed by numerous Jehovah's Witnesses stating that he was a minister of religion in the Jehovah's Witnesses sect (R. 124-125); a printed card issued by the Watchtower Society stating that he was ordained by God as a minister of Jehovah's Witnesses (R. 125-126); an occupational questionnaire stating that he was a student at the University of South Carolina studying engineering, that he was also "studying ministry at home," and that he had practiced the ministry since 1938 by going from "door to door

to the people" (R. 126-127); and a copy of an opinion of the Director of Selective Service concerning the circumstances in which Jehovah's Witnesses might be classified as ministers of religion (R. 127-130).

On April 2, 1943, the local board classified petitioner 1-A (R. 130). He immediately requested a personal appearance before the board and he was granted one on April 12. At that time petitioner appeared before the board and, according to his testimony, "I proceeded to show them from the scriptures and from the facts that I was a minister—from the notes I had.<sup>3</sup> They said, 'You have those things written down?' I said, 'Yes.' They said, 'You needn't quote scripture. Give us the notes [which petitioner had prepared in advance of the hearing], and we'll look them over.' " (R. 131.) On May 18, 1943, the local board classified petitioner 1-A-O, as a conscientious objector to combatant military service (R. 132).

Petitioner again requested a personal appearance before the local board and he was granted a hearing on May 25 (R. 132). At this hearing petitioner had access to his selective service file and he "went through this file," pointing out that he was claiming classification as a minister of religion (R. 132-134) and that he was attending college because his father "insisted" (R. 135). He testified that he told the board of his early

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<sup>3</sup> The text of petitioner's notes is set forth at R. 152-155.

life and religious upbringing and he explained that his ministerial activity consisted of "calling upon people, announcing and pointing out the pending disaster coming upon the world—the battle of Armageddon—and that His Kingdom would be established on earth as it is in heaven, and that only those would be privileged who came into the Lord's organization and took a stand for Him in His Kingdom. To those persons interested, I left the printed Bible sermons, where they could sit in their homes and read those statements and see and learn the fulfillment of Bible prophecy, and that we are living in the last days now. If those persons showed an interest, I called back later" (R. 135-138). In addition, he told the board that he showed people upon whom he called how to use the Bible, and that he stood on street corners distributing printed sermons of the Watchtower and Consolation Magazines "for small contributions" or, if necessary, without payment; that he was an assistant to the presiding minister; and that he delivered "sermons," encouraging "a greater participation in the work of publicly preaching the gospel of the kingdom" (R. 138-139).

The local board advised petitioner that they would classify him in 1-A or 1-A-O (R. 141). Petitioner thereupon withdrew his claim to classification as a conscientious objector and he was therefore classified 1-A (R. 28-29). The local board chairman testified, concerning this hearing,

that the board gave petitioner "as long a hearing as it was possible to give him" and that, in his view, none of the information in petitioner's selective service file showed that he was a minister of religion; that the evidence showed, instead, that he was a student studying engineering (R. 29).

On the same day, May 25, 1943, petitioner addressed a letter to the local board notifying it that he was appealing to the board of appeal and that he would assign the grounds for the appeal at a later time (R. 143). On the next day petitioner wrote a letter to the board of appeal setting forth his grounds of appeal as follows (R. 144-145):

\* \* \* I am basing my claim for re-classification on the fact that I am a minister and not a conscientious objector.

3. The only reason that I have not put my full time in Ministerial work is that my father requested that I go to college and I was under age and I obeyed his wishes. However, it is my intention at the completion of this semester to become a Pioneer and devote my full time to the work of the Ministry. \* \* \*

The board of appeal classified petitioner 1-A and he then appealed to the President, the highest appellate authority in the Selective Service System (R. 145-146). On August 6, 1943, petitioner was notified that he had been classified 1-A on the appeal to the President (R. 146). Petitioner testified that he "immediately went out and se-

cured letters, affidavits, and petitions from ministers and other persons and from the Watch Tower Society, stating that I was an ordained minister of the gospel" (R. 146). Petitioner submitted these papers to the local board through the government appeal agent, who personally appeared before the board on September 7, 1943 (R. 147). The board declined to reopen the classification (R. 147). Petitioner requested and was granted a hearing on September 14, at which he summarized the evidence in support of his claim to classification as a minister of religion (R. 147-149). The board again declined to reopen the classification (R. 149). The minutes of the board recite that the board considered the newly submitted evidence, but that they unanimously declined to reopen the classification because the evidence was "merely a repetition of evidence already passed upon by this Board, by Board of Appeal No. 1 at Charleston, and by the President" (R. 151).

On September 18, 1943, petitioner was issued an order to report for induction on September 30. He reported but refused to submit to induction (R. 4).

In addition to the evidence summarized above concerning the proceedings before the selective service agencies, the trial court admitted *de novo* evidence concerning petitioner's status (see R. 91-105). H. L. Crout testified that he had been the presiding minister of the Columbia congre-

gation of Jehovah's Witnesses since 1930 (R. 73); that Jehovah's Witnesses are evangelists who preach the gospel from house to house and upon the streets (R. 74-75); that there were 75 members in the Columbia congregation, under his supervision (R. 75); that Jehovah's Witnesses are ordained by God and also receive a temporal evidence of their ordination from the Watch Tower Society (R. 80); that every Jehovah's Witness is a minister of religion, "a man or woman could not be a Jehovah's Witness unless he's a minister" (R. 82-83); that he had known petitioner since 1938 and petitioner had been actively engaged in preaching since that time (R. 76); that he had several assistants, including petitioner (R. 76); that in addition to being presiding minister of the Columbia congregation he operated a garage (R. 82); and that he was classified 4-D, as a minister (R. 82).

Petitioner's parents also testified in his behalf. His father testified, in substance, that he was opposed to petitioner's activities as a Jehovah's Witness and that it was at his insistence that petitioner studied engineering at the University of South Carolina (R. 63-64). Mrs. Smith testified that from early childhood petitioner had been trained in the faith of the Jehovah's Witnesses (R. 49-51). She said that petitioner attended the public schools and that, in addition, he attended two-hour classes twice weekly in the "Watch Tower Divinity School" (R. 51-52). In

1938, according to her testimony, when petitioner was fourteen years of age (R. 61), he became a minister by going "from house to house preaching the gospel of God's kingdom" (R. 52). On cross-examination Mrs. Smith testified, *inter alia*, that one becomes a minister by consecrating himself to God's will (R. 56) and that all Jehovah's Witnesses, including herself, are ministers (R. 60-61).

In submitting the case to the jury the trial judge instructed them, *inter alia*, that petitioner was entitled to an acquittal if the jury should find either that there was not substantial evidence before the Selective Service System supporting the denial of petitioner's claim to classification as a minister, or that, on the basis of all the evidence adduced at the trial, petitioner was a minister within the meaning of the Selective Training and Service Act (R. 268-271). The jury found petitioner guilty (R. 300).

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment was reversed (R. 353-354). The court remanded the case for a new trial because it concluded that the trial judge erred in permitting the jury to determine whether petitioner was a minister of religion and in instructing the jury that they might consider conscientious objection to participation in war as a factor in determining the credibility of the witnesses, including petitioner. (See R. 114, 287.)

## ARGUMENT

Petitioner's sole contention in this Court is that the circuit court of appeals erred in remanding the case for a new trial, instead of ordering the indictment dismissed on the ground that the evidence at the trial conclusively demonstrated that his selective service classification was illegal. None of the three grounds upon which petitioner relies to show that his classification was illegal has, in our view, any merit.

1. *The record on the administrative appeal was complete in all respects.*—Petitioner contends (Pet. 21-26) that when he appeared before the local board on May 25, 1943, he submitted considerable oral information which the board failed to summarize in writing and place in his selective service file, and that, as a result, this information was not included in the record on his appeals to the board of appeal and the President. Since it is the duty of the local board to place in the registrant's selective service file a summary of any facts the board considers which do not appear in the written information in the file (Reg. 627.13 (a), *infra*, p. 32), petitioner urges that the local board departed from the Selective Service Regulations in his case. Basic to this contention is the question whether petitioner did in fact furnish new oral information to the local board at the May 25 hearing. We agree with the court below (R. 348-349) that this was a ques-

tion of fact for the jury and that the trial judge did not err in not directing a verdict for petitioner on this ground.

The only evidence purporting to show that petitioner orally furnished new information to the board at the hearing in question came from petitioner himself. He testified that when he appeared before the board on May 25, 1943, he went through the documents in his selective service file which he had previously offered in support of his claim to classification as a minister; that he discussed the scriptures with the board, pointing out that he had been ordained by both God and the Watchtower Bible and Tract Society; that he pointed out that after completing school, his "intention and purpose was to go in the ministry full time, but, because my father was not a Jehovah's Witness, he insisted that I go to college, and I went to college, and all the time I was going, I continued to perform—my time from September 1938 until I became a full time minister," and that the time devoted to his religious activities had increased from 30 hours each month to 80 hours; that he orally reviewed for the board his early training in the faith of the Jehovah's Witnesses sect and his desire to become a minister; and that he also told the board that he practiced the ministry by preaching from house to house (R. 132-141).

Mr. Britton, the chairman of the local board, testified concerning the May 25 hearing that the

local board had considered the evidence previously submitted by petitioner before he appeared at the hearing; that when petitioner came before the board they considered all that he had to say; that the board gave him "as long a hearing as it was possible to give him"; that in his opinion the information in petitioner's selective service file showed that petitioner was an engineering student, not a minister of religion; that he had no recollection of petitioner's telling the board that "he was going to quit college and go into the full time ministry work"; that the selective service file contained information submitted by petitioner to the effect that he was a minister of religion; that it also showed that he was a student in engineering at the University of South Carolina and that when he entered college, in answer to a question as to which religion he preferred, he stated in an application form, "none" (R. 28-32, 34-37).

In addition to the testimony of the local board chairman, there is strong circumstantial evidence which casts serious doubt on the veracity of petitioner's testimony concerning the May 25 hearing. Petitioner's present claim was advanced for the first time at the second trial of this case in March 1946, almost three years after the hearing in question, notwithstanding the fact that he had numerous opportunities to raise the issue at other times. On May 25, 1943, after the hearing, petitioner took an appeal to the board of

appeal and on the next day he submitted a statement asserting the grounds of his appeal, as was his right under Regulation 627.12 *infra*, p. 32. The present contention was not referred to in the statement.\* When it is recalled that petitioner was before the local board at the hearing and had an opportunity to observe whether the board was making an effort to summarize in writing his alleged new oral information,<sup>5</sup> we

\* Section 627.12, in contemplation of claims such as that which petitioner now makes, specifically provides that when a registrant takes an appeal he may attach to his questionnaire or notice of appeal a statement specifying, *inter alia*, "any information which was offered to the local board and which the local board failed or refused to include in the registrant's file." It was also petitioner's privilege under Section 605.32 of the Regulations to examine his selective service file to ascertain whether the information in question had been summarized and placed in the file. Since petitioner filed a statement on appeal, there can be no serious question that he was aware of these administrative remedies. However, by failing to specify the information which he now claims should have been included in his file, he failed to exhaust these remedies. See the *Estep* decision, 327 U. S. at 124-125, note 17. The answer of the court below (R. 349-350) to this argument, that Section 627.12 confers a privilege on the registrant but does not impose a duty on him, overlooks the fact that in most cases administrative remedies are matters of privilege. For example, a right to take an administrative appeal is a privilege. Yet it has never been doubted that a registrant who has not appealed from a local board classification has not exhausted his administrative remedies.

<sup>5</sup> If petitioner furnished the extensive verbal information to which he testified at the trial (R. 132-141) it should have been plain to him that unless a summary was prepared while he testified before the board an accurate one could not be prepared at a later date, for the hearing was a long one and petitioner claims that he furnished an extensive life history of his religious training and activities.

think the failure of petitioner contemporaneously to assert his claim in his statement on appeal casts doubt upon his subsequent testimony at the trial. This doubt is intensified by the circumstance that petitioner made no claim at the trial that the alleged irregularity was newly discovered. Further doubt arises from the fact that when petitioner requested the local board to reopen his classification after his final unsuccessful appeal to the President, he again failed to advert in any way to the alleged irregularity. While he now urges (Pet. 23-24) that his classification should have been reopened to cure the irregularity, there is nothing in either of his requests to reopen of September 7 and September 14, 1943, which even suggested that he had furnished oral information to the local board which had not been summarized in writing and placed in his file (see R. 146-149, 309-333).<sup>\*</sup>

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<sup>\*</sup> The local board had power to reopen the classification only if it determined that new facts were presented which, if true, would require a reclassification (Reg. 626.2 (a), *infra*, p. 31). The board twice considered requests to reopen petitioner's classification and on both occasions it concluded that the new matter presented was merely repetitious of the information which had been placed before the board prior to his classification. Having so found, the board, of course, lacked power to reopen the classification. Even if it be assumed, *arguendo*, that the board erred in its finding that the new matter was merely cumulative, its conclusion was reached in conformity with the requirements of section 626.2, and there is no showing that the board did not honestly exercise its discretion. In these circumstances the board's determination is unassailable. "The decisions of the local boards

There is no evidence that at any time from May 25, 1943, until the date of his second trial in March 1946, petitioner ever advised any agency of the Selective Service System of his present claim. In addition to these circumstances, the trial judge, in considering whether to direct a verdict for petitioner, was free to take judicial notice of an earlier habeas corpus proceeding in the same court (*Smith v. Richart*, 53 F. Supp. 582 (E. D. S. C.)), where petitioner challenged the legality of his selective service classification on various grounds, none of which included his present claim.

When viewed in this context, petitioner's unsupported testimony did not, we believe, require the trial judge to take the issue from the jury. Instead, as the court below concluded, these "questions of fact were for the jury and it was for them to decide whether the defendant actually gave additional facts which were not included in the record" (R. 349). The question was fully argued to the jury by petitioner's counsel (see R. 221-226), and the trial judge carefully instructed the jury that if they should find that the local board failed to reduce to writing any material facts orally presented by petitioner at the May 25 hearing, he was entitled to a verdict of

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made in conformity with the regulations are final even though they may be erroneous." *Estep v. United States*, 327 U. S. at 122. See also *Cramer v. France*, 148 F. 2d 801, 804 (C. C. A. 9); *United States v. Commanding Officer*, 142 F. 2d 381, 382 (C. C. A. 2).

acquittal (R. 241-242, 271, 274-276). In the light of these circumstances, the conclusion must be that the jury, with reason, resolved the issue of credibility against petitioner.

In any event, as the circuit court of appeals observed (R. 349), this question concerning the May 25th hearing can be fully explored on the retrial of the case through the testimony not only of petitioner, but also of the members of the local board and the government appeal agent who were present at the hearing. If petitioner's story is true, it undoubtedly will find support in the testimony of these persons.

2. *There was ample factual basis for petitioner's classification.*—As a second ground for urging that the court below should have remanded the case with directions to dismiss the indictment, petitioner urges (Pet. 27-35) that the denial of his claim to exemption from service as a minister of religion is contrary to the undisputed facts before the Director of Selective Service when he finally classified petitioner on the appeal to the President. We agree with petitioner that the judicial inquiry must be limited to the facts of record before the final classifying agency. Accordingly, the evidence which was adduced *de novo* at the trial (*supra*, pp. 9-11) is not pertinent to the present discussion.

To demonstrate to his board that he is an ordained minister of religion, as he contends, petitioner had the burden of showing that he was

ordained by his sect and that he customarily teaches and preaches the tenets of the sect and administers its rights and ceremonies in public worship (Reg. 622.44 (c), *infra*, p. 28). As the court below notes (R. 345-346), in applying this provision to members of the Jehovah's Witnesses sect, the Director of Selective Service has instructed the local boards as follows:

Whether an official of the Jehovah's Witnesses group stands in the same relationship to this group as a regular or duly ordained minister in other religions must be determined in each individual case based upon whether he devotes his life in the furtherance of the beliefs of Jehovah's Witnesses, whether he performs functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.<sup>7</sup>

It is clear, therefore, that the Selective Service System has recognized that the religious leaders of the Jehovah's Witnesses sect are entitled to exemption from service under the act just as are the leaders of any other religious group. It is equally clear, however, that the Selective Service

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<sup>7</sup> These instructions were originally embodied in Opinion No. 14 of the Director of Selective Service and are presently contained in State Director Advice No. 213-B, issued by the Director on June 7, 1944.

Regulations, particularly as construed by State Director's Advice No. 213-B, do not contemplate that every member of the Jehovah's Witnesses sect should be exempted from service. Instead, the legislative standard, as implemented by the administrative regulations and interpretations, contemplates that only those Jehovah's Witnesses who stand in the same relative position in their group as do recognized ministers of other religious denominations are entitled to be classified as ministers of religion.

The question at issue is whether there is any evidence in petitioner's selective service file which supports the Director's final determination that petitioner had not shown himself to be entitled to classification as a minister of religion. The information before the Director, summarized in the Statement, *supra*, pp. 3-9, shows that petitioner, a boy of 18, was, at least until after he was classified 1-A, a student in engineering at the University of South Carolina, and that he intended to complete his course and enter the engineering profession. He joined the Jehovah's Witnesses sect in 1938 and he claimed that he became a minister in the sect in the same year, when he was 14 years old. His religious activities from 1938 through 1942 consisted of devoting an average of 20 hours each week to "studying and preaching" the tenets of his sect. Some of this time he spent in going from "door to door to the people." Petitioner advised the local board

that his minister of religion in the Jehovah's Witnesses sect was one H. L. Crout. The only information in the administrative record, as it was when petitioner was finally classified by the Director, concerning petitioner's plans for the future is found in his statement on appeal to the board of appeal, where he said that he intended to complete the present semester at college and then to devote "my full time to the ministry." There was no evidence before the Director showing that petitioner had actually withdrawn from college or that he was in fact devoting his full time to religious activities.

Contrary to petitioner's argument, we think these facts failed utterly to show that petitioner stands in the same relationship to the Columbia, South Carolina, unit of Jehovah's Witnesses, with which he is affiliated, as do ministers of other religious faiths to their congregations. Indeed, it affirmatively appears from the information supplied by petitioner that he regards one H. L. Crout as his minister or religious leader.<sup>8</sup> Most of petitioner's time and effort was spent in studying engineering, not in preaching and teaching the tenets of his religion and performing the usual functions of the average minister of religion. Petitioner's evidence, even when considered in the light most favorable to him, shows only that, like all other Jehovah's Witnesses, he practices

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<sup>8</sup> Crout had been classified IV-D as a minister of religion (*supra*, p. 10).

his religious beliefs by witnessing from house to house and on the streets, in his case for an average of 20 hours each week. In our view, such evidence does not demonstrate that there was no foundation in fact for the Director's refusal to classify petitioner in 4-D.<sup>9</sup> To the contrary, we think the court below was clearly correct in holding (R. 345) that there was substantial ground for denying petitioner's claim to exemption. See also *Smith v. Richart*, 53 F. Supp. 582 (E. D. S. C.), and *Smith v. United States*, 148 F. 2d 288 (C. C. A. 4), reversed on another ground, 327 U. S. 114, where the facts in petitioner's case are considered and where the same conclusion is reached; *Sunal v. Large*, decided July 29, 1946 (C. C. A. 4), pending on petition for a writ of certiorari, No. 535, this Term, and cases collected in that opinion.

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<sup>9</sup> Petitioner urges (Pet. 28) that his case is the same on its facts as *United States v. Stalter*, 151 F. 2d 633 (C. C. A. 7), where the court concluded that the registrant was improperly denied classification in 4-D. We think that decision is open to serious question, since it nowhere appeared from the facts that the registrant stood in the same relationship to other Jehovah's Witnesses as does a minister in other religious sects to his congregation. Significantly, however, the court there disagreed with petitioner's view advanced here that all Jehovah's Witnesses are ministers and are thus exempt from military service (151 F. 2d, at 637). The court found, however, that the petitioner in that case devoted his "full time to ministerial work" and that he therefore should have been classified as a minister. The case is therefore clearly distinguished from that at bar.

3. *The Board's clerk was authorized to sign its order to report for induction.*—Petitioner also urges (Pet. 36–38) that his induction order was void as a matter of law because it was signed by the clerk of the local board. His argument is that under Section 603.59 of the Selective Service Regulations, *infra*, p. 27, the clerk<sup>k</sup> may sign official papers only “if he is authorized to do so by a resolution duly adopted by and entered in the minutes of such local board,” and that since the minutes of the local board do not reflect such a resolution, the induction order lacked validity.

It is not disputed that petitioner was classified 1-A, or that the local board, acting as a board, determined that petitioner should be ordered to report for induction on September 30, 1943, or even that the induction order was issued as the order of the board and was signed by the clerk at the direction of the board. Likewise, there is no question that petitioner's refusal to submit to induction was not attributable in any respect to the fact that the clerk signed the induction order as the agent of the board.

The chairman of the local board testified at the trial that at the inception of the local board's activities they authorized their clerk to sign induction orders for the board (R. 16–17). The resolution authorizing the clerk to do this was not entered in a minute book because “the government when it first set up Selective Service

did not give us minute books, and in the early stages of the Selective Service Act, we did not keep minutes of all our board meetings" (R. 15-16). Thus, the sole basis for petitioner's contention is the failure of the local board to record its resolution in a minute book. Clearly, the local board's failure to comply with this directory administrative detail in the performance of its duties is not a matter of sufficient substance to vitiate its jurisdiction to order petitioner to report for induction. It can hardly be said that the failure of the board to make a proper entry, which in no way related specifically to petitioner or prejudiced him affected the jurisdiction of the board. A contrary conclusion would mean that the board lacked jurisdiction to order for induction the thousands of men who were inducted from that board. But as the Second Circuit said in *United States v. Drum*, 107 F. 2d 897, 900-901, certiorari denied, 310 U. S. 648—

A clerical error [involving a departure from the Selective Service Regulations] committed by the local Draft Board—civilians volunteering for the service without special training therefor—should not be held to throw the machinery of the draft out of commission when it worked no perceivable prejudice to the rights of any one.

## CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1946.

## APPENDIX

The Selective Training and Service Act of 1940, 54 Stat. 885, as amended (50 U. S. C. Appendix 301-318) provided in part as follows:

SEC. 5 \* \* \*

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

\* \* \* \* \*

SEC. 10 (a). The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provision of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. \* \* \* Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with re-

spect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe \* \* \*

SEC. 11. Any person \* \* \* who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act \* \* \* shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, \* \* \*.

The pertinent Selective Service Regulations provide as follows:

603.59 *Signing official papers.*—Official papers issued by a local board may be signed by the clerk "by direction of the local board" if he is authorized to do so by a resolution duly adopted by and entered in the minutes of such local board, provided that the chairman or a member of a local board must sign a particular paper when specifically required to do so by the provisions of a regulation or by an instruction issued by the Director of Selective Service (6 F. R. 6828).

\* \* \*  
622.44 *Class IV-D: Minister of religion or divinity student.*—(a) In Class IV-D shall be placed any registrant who is a

regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

(b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties (6 F. R. 6610).

\* \* \* \* \*

623.2 *Information considered for classification.*—The registrant's classification shall be made solely on the basis of the Selective Service Questionnaire (Form 40), Affidavit of Dependent Over 18 Years of Age (Form 40A), Affidavit—Occupational Classification (General) (Form 42), or Affidavit—Occupational Classification (Industrial) (Form 42A), and such other written information as may be contained in his file. Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the

local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file. (7 F. R. 9607.)

\* \* \* \* \*

625.1 *Opportunity to appear in person.*—(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than the registrant may request an opportunity to appear in person before the local board. (6 F. R. 6843.)

\* \* \* \* \*

625.2 *Appearance before local board.*—

(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classification Record (Form 100). If the registrant does not speak English adequately, he may appear with a person to act as interpreter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified: *Provided*, That if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again

classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification. (6 F. R. 6843; 7 F. R. 9607.)

\* \* \* \* \*

626.2 *When registrant's classification may be reopened and considered anew.*—(a) The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (Form 150) unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

(b) At any time before the induction of a registrant, the local board shall reopen and consider anew such registrant's classification upon the written request of the State Director of Selective Service or the

Director of Selective Service. (7 F. R. 110, 653, 2089.)

\* \* \* \* \*

627.12 *Statement of person appealing.*—

The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file. (6 F. R. 6845.)

\* \* \* \* \*

627.13 *Local board to transmit record to the State Director of Selective Service.*—

(a) Immediately upon an appeal being taken to the board of appeal, the local board shall carefully check the registrant's file to make certain that all steps required by the regulations have been taken and the record is complete. If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision. (7 F. R. 2090.)

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U.S. Supreme Court, D.C.  
FILED  
DEC 15 1944  
U.S. DEPT. OF JUSTICE

SUPREME COURT OF THE UNITED STATES

October Term 1944

No. 534

□

LOUIS DABNEY SMITH *Petitioner*

v.

UNITED STATES OF AMERICA *Respondent*

□

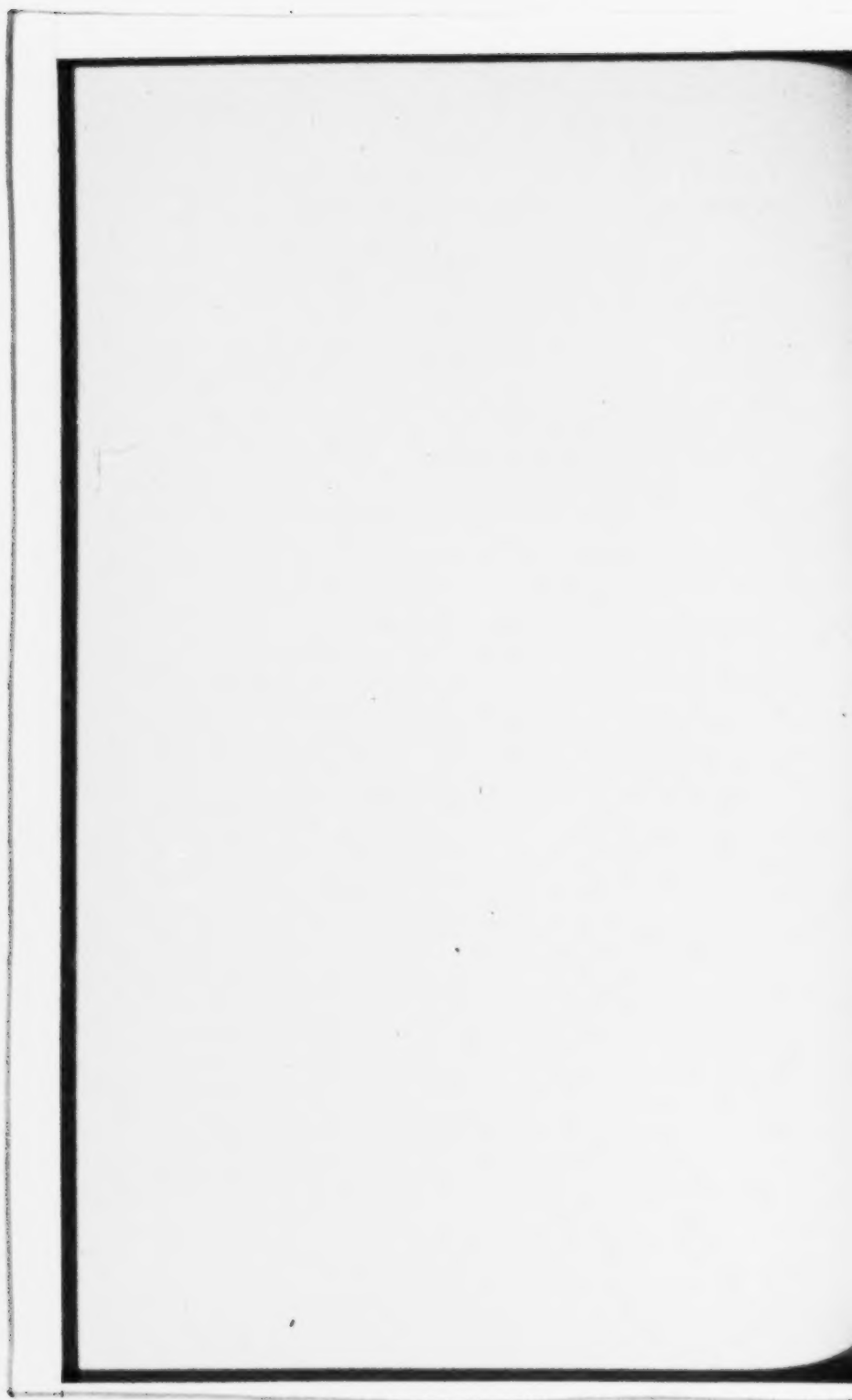
ON PETITION FOR WRIT OF HABEAS CORPUS  
TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

**Petitioner's  
PETITION FOR REHEARING**

HAYDEN C. COVINGTON  
*Counsel for Petitioner*

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**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1946

**No. 534**

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LOUIS DABNEY SMITH *Petitioner*  
v.  
UNITED STATES OF AMERICA *Respondent*

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

**Petitioner's**  
**PETITION FOR REHEARING**

MAY IT PLEASE THE COURT:

Within time fixed by rules of the court and the order enlarging the time, petitioner files and presents this his petition for rehearing and for recall and stay of the mandate pending disposition of this petition for rehearing and his petition for writ of certiorari. The court is requested to grant the petition for rehearing, order the petition for writ of certiorari granted, recall the mandate and order its stay pending final determination of this cause upon the petition for writ of certiorari.

## Grounds

### ONE

This court should have exercised its discretion and granted the writ because the Second Circuit Court of Appeals, since the filing of the petition for writ of certiorari in this case, has decided the case of *United States ex rel. Kulick v. Kennedy*, directly conflicting with the decision of the court below on the effect of the failure to make a record of the oral evidence given by petitioner at his personal appearance before the local board.

### TWO

This court should have exercised its discretion and granted the writ because the question of whether the draft boards acted without basis in fact in classifying petitioner and denying his claim for exemption is identical with the question presented to this court in the petition for writ of certiorari in *Sunal*, petitioner, v. *Large*, No. 535 October Term 1946, now pending, and in *United States ex rel. Kulick v. Kennedy*, decided by the Second Circuit Court of Appeals and which the Solicitor General will present in the near future to this court upon petition for writ of certiorari.

### THREE

This court should have exercised its discretion and granted the writ because the decision of the court below that the classification of petitioner and the denial of his claim for exemption as a minister of religion had basis in fact is in direct conflict with the holding of the Seventh Circuit Court of Appeals in *United States ex rel. Hull v. Stalter*, 151 F. 2d 633.

### FOUR

This court should have exercised its discretion and granted the writ for each and every one of the reasons stated in the petition for the writ.

## DISCUSSION and Reasons Supporting Petition

In *United States ex rel. Kulick v. Kennedy*, decided October 29, 1946, by the Second Circuit Court of Appeals, it was held that failure of the draft board to reduce to writing the testimony Kulick gave before the local board at a personal appearance was a procedural violation which invalidated the administrative process. In that case Judge Learned Hand said:

" . . . At that time he submitted an affidavit and a written statement, asserting that he was a 'regular or ordained minister' of Jehovah's Witnesses; and he testified at length. (There was no stenographer present, and the only record of what he said is his own testimony at the trial and that of one member of the board whom he then called.)

" . . . He appeared on the 11th, but there is no record of what took place except that his classification was not disturbed.

" . . . Be that as it may, in the case at bar that was not the sum of what Kulick showed, and tried to show, and incidentally, as we have said, the record before the board did not preserve any testimony there taken. Surely it can never be tenable to make critical what chances to be preserved in that record. Evidence is no less evidence because it is not recorded; and anything which in fact tends to establish that the accused did not have a fair hearing must be available in support of his defence, from whatever source it comes."

In connection with the contention that a substantial question is presented to this court that ought to be decided but which has not been decided by this court on the issue of the board's failure to reduce to writing the oral evidence given by Smith, this court is respectfully referred to the petition for writ of certiorari: See pages 8-13, 21-26.

Also, the court is referred to petitioner's reply to the Government's brief in opposition to the petition for writ of certiorari, pages 1-7.

In the pending case of *Sunal v. Large*, No. 535 October Term 1946, it is the position of the Government that the only question presented to this court is whether or not there was basis in fact for the classification made by the draft board. If this is true, and the court is prepared to consider that question, then the *Sunal* case presents to this court the identical question presented to this court in this *Smith* case.

The Government also purposes to present to this court the same question in *United States ex rel. Kulick v. Kennedy*, in its petition for writ of certiorari to be filed in due course.

The *Sunal* and *Kulick* cases raise the issue of whether a full-time minister of the gospel, whose life is devoted to his work as a minister, may be deprived of his claim for exemption because he performs part-time secular work. In the *Sunal* case Sunal devoted an average of 140 hours per month to secular work as a garage mechanic, which did not prevent him from regularly discharging his ministerial duties. In the *Kulick* case the registrant performed services as an artist's model to the extent of three or four hours weekly. This also did not interfere with regular performance of his ministerial services or deprive him of his status as a full-time minister of the Watchtower Bible and Tract Society.

In the case at bar Smith did not do any secular work whatever. It is true that at the time he was classified by the local board he was attending the University of South Carolina. However, this did not prevent him from devoting upward of 90 hours per month to his ministerial work. The undisputed evidence showed that Smith was a minister and stood in relation to the Columbia congregation of Jehovah's witnesses in the same way as did ministers of orthodox faiths.

The court below considered Smith's attendance at college as ground for the classification given him by the draft board.

If in the *Sunal* and *Kulick* cases the performance of secular work is to be considered as ground for denial of the claim for exemption, then *in fairness* the court should also consider and review whether Smith's attendance at the time of the local board's classifying him, justified the local board's denial of Smith's claim for exemption.

The undisputed evidence showed that at the time Smith was finally classified by the board of appeal on June 15, 1943 [8, 141-148] \*, he was actually engaged in the full-time ministry, having entered it on June 1, 1943, after quitting college at the end of the semester in May 1943. [140, 141; see also other parts of the record which show that before he was finally classified by the board of appeal he was engaged in full-time missionary evangelistic work: pages 30-31, 36-37, 146-148.]

It was the duty of the draft boards to classify petitioner according to his actual status as of the date of the final classification.

In this respect the case at bar is almost identical with the *Hull* case, *supra*. (151 F. 2d 633) Hull, at the time he registered, was regularly engaged in full-time secular work as well as in part-time ministerial activity. Shortly before his final classification he stated that he expected to quit his secular job and engage in the full-time ministry on September 1, 1941. However, due to matters over which he had no control he was unable to begin his full-time ministerial work until about October 1. On September 18, 1941, the board placed him in Class I-A-O. He afterward appealed and was finally classified IV-E, whereby his claim for exemption as a minister of religion was denied. The court held that he was entitled to be classified by the board of appeal according to his status at the time of his classification by the board of appeal. At such time he was engaged

\* Bracketed figures denote pages of printed record.

in full-time missionary work. This is identically the case with Smith.

In the *Hull* case the court said: "We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. . . . The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than that at the time of registration."

Moreover the facts in the *Smith* case with respect to ministerial status are identical with the facts in the *Hull* case with respect to ministerial status.

At the time Smith registered he was a part-time minister.

At the time Hull registered he was a part-time minister.

Before Smith was finally classified by his local board he informed the board that he intended to go into the ministry full time. That is exactly what Hull told his local board before he was classified.

Subsequent to the classification by the local board, but before the classification by the board of appeal in the *Hull* case, Hull actually entered into the full-time missionary work.

In the *Smith* case, subsequent to his classification by the local board, but before the classification by the board of

appeal, Smith actually entered into the full-time missionary work.

In the *Hull* case, as well as in this *Smith* case, the draft boards rely on the same grounds for denying the claim for exemption. In the *Hull* case the Seventh Circuit Court disposed of these excuses, urged as grounds for denial, in the following language:

"In our view, there are only two circumstances which could at any time have furnished the slightest justification for the Board's refusal to classify relator as a minister, (1) information contained in his questionnaire and (2) the fact that he was not registered with the National Headquarters of the Selective Service System as a minister. True, his questionnaire disclosed that he was not a full time minister, part of his time being devoted to secular occupations. The questionnaire, however, also disclosed that commencing September 1, 1941, he expected to cease his secular activities and devote all of his time to ministerial work. That his intention in this respect was fully performed is not open to dispute. There is not a scintilla of evidence upon which a contrary conclusion or even a reasonable inference could be predicated. The fact that his name was not included as a minister of Jehovah's Witnesses at National Headquarters of the Selective Service is of little or no consequence under the facts of the case. While it perhaps was a circumstance to be considered by the Board, it constituted no proof as to relator's actual status. Furthermore, the practice of placing names upon this list was discontinued by the National Director of Selective Service on November 2, 1942 (relator was finally classified February 3, 1943). We have serious doubt that there was any justification for the Board's refusal originally to classify relator in 4-D. Whatever he thought, however, of the Board's original action in this respect, there can be no question but that subsequent proof conclusively demonstrated that he was entitled to such classification."

There is a direct conflict between the holding of the court of appeals in the *Hull* case and that of the court below in the *Smith* case and in the *Sunal* case. The court below referred to and made its *Sunal* opinion a part of its opinion in this *Smith* case, saying, "See also the discussion of this subject in the concluding portion of the opinion of this court filed contemporaneously herewith in *United States ex rel. Sunal v. Large, Superintendent.*" [346]

The court below recognized that its decision was in conflict with the decision of the Seventh Circuit Court in the *Hull* case. In the *Sunal* case, immediately following note 7 of its opinion, the court below referred to the *Hull* case, as follows: "Cf. *United States ex rel. Hull v. Stalter*, 151 F. 2d 633." See record in the *Sunal* case, page 117.

It is respectfully submitted that the direct conflict upon this important federal question (undecided by this court) in the decisions of the Fourth and Seventh Circuit Courts should be ground for granting the petition for writ of certiorari in this case.

Also, if this court is prepared to consider this question in the *Sunal* case and in the *Kulick* case, then the same question presented in this case should be of sufficient substance to require the granting of the writ and the full consideration of the question in this case. Indeed, the court below, in its treatment of this question in the *Smith* case, considered it along with the same question that was involved in the *Sunal* case. The *Sunal* and *Smith* cases were companion cases in the court below. In those two cases the court's two separate opinions referred to each other, and each opinion was incorporated in the other as presenting, reciprocally, related supporting reasons. Because of this circumstance it is respectfully submitted that the *Smith* case should be considered by this court along with the *Sunal* case, if, as and when the petition for writ of certiorari is granted, as well as with the *Kulick* case in event that

the writ is granted in that case subsequent to the filing of the petition for the writ by the Solicitor General.

In this case the mandate has been sent to the district court. The federal attorney threatens to bring the case on for an early trial. In order to preserve the status quo in this matter, and to avoid a conflict between the jurisdiction of the district court and that of this court in these proceedings, it is necessary for this court to recall the mandate and stay the execution thereof pending a determination of this petition for rehearing and the petition for writ of certiorari.

### Conclusion

WHEREFORE petitioner prays that this court exercise its sound discretion and grant the petition for rehearing, set aside and hold for naught its former order denying the petition for writ of certiorari, recall the mandate and order the same stayed pending a determination of the case upon the petition for writ of certiorari, and that the cause be set down for argument and submission and that the judgment of the court below be reversed and the prosecution dismissed or, in the alternative, a new trial be ordered. Petitioner further prays as in his petition for writ of certiorari.

Respectfully submitted,

LOUIS DABNEY SMITH, *Petitioner*

By HAYDEN C. COVINGTON  
*Counsel for Petitioner*

**Certificate**

The undersigned counsel for petitioner in the above-entitled and numbered cause hereby certifies that the foregoing petition is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON

December 10, 1946